The restraint of trade doctrine in England, Scotland and South Africa

With specific reference to post-employment, sale of business and post-partnership restraints

by

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Vir Oupa, Pa en Ma. So oneindig baie geduld en liefde

Foreword

Reinhard Zimmermann in his *Law of Obligations* complained that a book of 1200 pages was "alarmingly short". I interpreted this as dry Hamburg humour. But I have now found myself in a similar position. There is still so much that one can say about the restraint of trade doctrine and yet the paper mountain on my desk just kept on mounting. It is lamentable that chapters on the newer types of restraints and the scope of the doctrine could not be included in this work but I already have to beg the patience of my dear readers.

I have referred to textbook writers more fully than is normally the case in English law and this meant that I could not keep up with the constant flow of new editions. But I have noted all changes in ideas by any of the authors, and discussions of new cases have been referred to. The idea has been to represent the general dogmatic approach of the different authors rather than to give the most up to date views on certain cases.

My supervisor Prof HL MacQueen was always prepared to wade through all the unrefined material that was laid before him. The family MacQueen gave support which goes far beyond the call of duty. Dr Alexander MacCall Smith provided us with the opportunity to come to Edinburgh. My "Chef" in Regensburg was most understanding and his carrot and stick support did much to help me through the last stage. I gratefully acknowledge the assistance of the following scholarships in South Africa:
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More than anything else I thank Hettie who had to suffer my absence and will now have to endure my presence.

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ABSTRACT OF THESIS (Regulation 3.5.10)

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Title of Thesis THE RESTRAINT OF TRADE DOCTRINE IN ENGLAND, SCOTLAND AND SOUTH AFRICA - WITH SPECIFIC REFERENCE TO POST-EMPLOYMENT, SALE OF BUSINESS AND POST-PARTNERSHIP RESTRAINTS

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The restraint of trade doctrine as understood here developed in English law, but it was transplanted to South Africa and Scotland. The two mixed legal systems closely followed English law. In Scotland a separate jurisprudence only recently developed in this area. In South Africa attempts have been made to distinguish the English doctrine, but it has remained fundamentally intact. That does not mean that the three systems are merely carbon copies of one another. Yet differences are subtle.

An attempt is made to analyse the doctrine from broad principles although it is difficult. The doctrine has always worked in practice, but produces nice theoretical problems. It is submitted that the public policy value of freedom of work should be the most important tenet underlying the doctrine. Only clauses that offend against this fundamental principle should be investigated in terms of this doctrine. Only when the courts find that the interference with freedom of work cannot be justified should clauses be struck down.

The classical restraints i.e. post-employment, sale of goodwill, and post-partnership restraints are discussed. These cases stand quite separate from most other restraints because they operate after termination of a work or production relationship, and because they have generated a vast corpus of cases.

The reasonableness inter partes test and the direct impact of public interest is analysed. Most importantly, it is argued that the public policy restraint of trade doctrine operates on two levels. The question whether the restraint is no wider than the legitimate interests of the covenantee makes or breaks a case. But many other aspects are also considered in filling the vacuums left by the severe difficulties of applying law to facts in this area of public policy.

The manner in which courts deal with restraints has a profound influence on the result of restraint of trade decisions. Here novel suggestions in South Africa have questioned old dogmas. The onus in restraint of trade cases, the consequences of restraints that are unacceptable, the point in time from which the restraint should be tested, and the severability issue are of pivotal importance. Finally, the question of remedies is addressed. Here the peculiarities of the Scots doctrine come to the fore. Restraints are often of short duration and the slow grind of court systems has to bow to practical necessity.

I Philippus Johannes Sutherland hereby declare that this thesis has been composed by me and that it is my own work.

PJ Sutherland
12 February 1997

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Chapter 1

Introduction

The scope of this work

In Digest 1.18.6.4 (Ulpianus libro 1, opinionum) it is stated that:

> Neque licita negotiatione aliquos prohiberi neque prohibita exerceri neque innocentibus poenas irrogari ad sollicitudinem suam praeses provinciae revocet.
> (The provincial governor must make it a matter of especial concern that no one be prevented from carrying on any lawful business, that no one carry on prohibited activities and that no innocent persons have penalties imposed on them.) [1]

The protection of freedom of work is an ancient principle. Two millennia of societal, legal and economic development have changed its appearance. The provincial governor is an institution of the past. Yet the principle still permeates modern legal systems. The modern vanguards of freedom of work are judges who bolster it through the doctrine of restraint of trade.

The doctrine of restraint of trade has equalled the durability of the principle on which it is founded. The abolition of slavery and, more recently the decline of large-scale manufacturing and the rise of the high-technology and service industries have even enhanced the importance of the doctrine [2]. The modern doctrine has its origin in late medieval and 17th century England [3] and it culminated in the fundamental *Mitchel* case [4]. But it crossed the Tweed into the Civil and Common law blend that is Scots law and it travelled the wide open seas to settle in Roman-Dutch South African law. The aim of this thesis will be to analyse the English mother doctrine and the two scion doctrines in Scotland and South Africa.

Nevertheless, no proper historical analysis will be attempted. The dogmatic development will be briefly sketched in the analysis of the many aspects of the doctrine, and some comments about its

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1. Andreas Wacke "Wettbewerbsfreiheit und Konkurentzverbotsklauseln im antiken und modernen Recht" 1982 *Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte* Romanist Abt 91 188 translated in the *Law and History Review* (1993) 1.
2. Davies 490.
3. Dyer's case (1414) YB Mich 2 Hen 5, Pasch pl 26; Anon (1578) Moore KB 115; Blacksmith of South Mims (1587) 2 Leo 210; Colgate v Bachelor (1602) Cro Eliz 872; Rogers v Parrey (1613) 2 Bulst 136; Jollife v Broad (1620) 2 Roll Rep 201, Cro Jac 596, Wm Jones 13; Bragge v Stanner (1621) Palm 172; Hall v Haws (1634) 2 Keb 377; Anon (1641) March 77; Barrow v Wood (1643) March 191; Prugnell v Gosse (1648) Aleyn 67; Ferby v Arrosmyth (1669) 2 Keb 377; Hunlocke v Blacklowe (1671) 2 Saund 156; Clerk v Taylors of Exeter (1685) 3 Lev 241; Thompson v Harvey (1689) 1 Holt KB 674.
4. Mitchel v Reynolds (1711) 1 PWms 181.

reception in South Africa and Scotland will be made. But no systematic exegesis will be undertaken. The reasons for this are pragmatic. A brief discussion of the development of the doctrine through the courts would merely be repetitive as this has been undertaken on many occasions [5], while a full socio-economic history of the doctrine would require a thesis in itself.

The doctrine shows many similarities whether it is applied in Mafeking or Manchester and, at least on the surface, it does not show much divergence from Ballachulish to Bournemouth. Hence this is no comparative study in the true sense. It does not primarily compare three legal systems with the aim of determining whether there is room for possible cross-pollination, for the doctrine itself is the true star of this performance. It will rather be discussed with reference to the three legal systems.

Lord Diplock in *Petrofina* [6] said: "A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to trade with other persons not parties to the contract in such a manner as he chooses." This will suffice as an introductory working definition. But in defining the restraint of trade doctrine one is conscious of the maxim periculosa omnia definitio est. The doctrine, especially in the classic cases, is like the infamous elephant, easy to recognise but almost impossible to define. Many have tried but no satisfactory description has emerged [7]. The next three chapters will accordingly be devoted to determining what a restraint of trade entails. At first the juridical niche of the doctrine will be described; thereafter the principles underlying the doctrine will be discerned, culminating in an analysis of the question: when does the restraint of trade doctrine apply? In drawing a distinction between the substantive and the jurisdictional questions the term "restraint of trade" will be reserved for clauses that have to be investigated but are not yet finally condemned for offending against the principles underlying the doctrine [8].

The doctrine does not only apply in a numerus clausus of contracts but can be found wherever there is a substantial interference with freedom of work. It has undergone a vigorous expansion from its traditional hinterland of sale of goodwill, post-employment and post-partnership restrictions.

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[5]. Heydon 1-35; Holdsworth *History of English law* IV 3rd ed (1945) 343-354, 373-379, VIII 2nd ed (1937) 56-62; Letwin "The English common law concerning monopolies" 1954 *University of Chicago LR* 355; Matthews and Adler *Restraint of Trade* 2d ed (1907) for a full textual treatment of the early cases; Sanderson *Restraint of Trade* (1926) 7-20; Seaborne-Davies "Further Light on the Case of Monopolies" (1932) *LQR* 394; Wilberforce Campbell and Elles 122 et seq; Trebilcock 1-59, But see infra Ch 3.

[6]. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 138

[7]. Esso 294, 307, 317-318, 324, 331; Chitty 1191.

[8]. Esso 331, Collinge 412, Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) 439, Kerr 505.

It will not even be restricted to contractual obligations in the true sense and will also apply to other legal mechanisms that interfere with the principles underlying the doctrine [9]. It has played a role in limiting regulations of professional sports bodies, professional control bodies, rules of co-operative societies as well as guilds, trade unions and other like organisations [10]. In fact the doctrine had its first real dawning in Scotland in trade union cases.

However, this thesis focuses on the traditional types of contractual restraints. So, regrettably, one of the most virile areas of restraint of trade will fall outside this discussion. But the restraint of trade doctrine is vast and a proper discussion of any aspect demands narrowing down. At least many of the points made in other areas of restraint of trade have imprinted themselves on the general doctrine and the discussion is specked with references to and discussion of many of the issues enumerated in other areas of restraint of trade.

The discussion of the substantive doctrine will form the core of the analysis. In most cases this will be the only issue that will really trouble a court. But some attempt will be made to relate it to the background within which it exists. The doctrine is still very fragmentary despite and sometimes because of innumerable cases and textbook discussions [11]. An attempt will be made here to develop it from one fundamental principle. The new areas of restraint can only be properly constructed once the problems in the bread and butter cases are solved.

Finally, considerable space will be devoted to the fate of restraints in the courts. If there is one thing on which ordinary people are still prepared to litigate, it seems, then it is when their ability to work is being interfered with. The formal rules which courts apply to restraints of trade have interacted considerably with the substantive rules and principles of the doctrine. The dominant aspects in South African and Scots law will be discussed under this rubric. The innovative *Magna Alloys* case in South Africa has had a radical impact on the manner in which courts approach restraints, while the Scots doctrine is being shaped in applications for interim interdicts, which has had a radical impact on de facto Scottish restraint of trade law. This calls for in-depth analysis.

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9. Heydon 73-75, Heydon *McGill* 334; Cheshire Fifoot and Furmston 406-407.
10. Russell v Amalgamated Society of Carpenters and Joiners [1910] 1 KB 506; Russell v Amalgamated Society of Carpenters and Joiners [1912] AC 421; Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558; Pharmaceutical Society of GB v Dickson [1968] 2 All ER 686; Nagle v Feilden [1966] 2 WLR 1027; Trebilcock 42, 190-191.
11. Davies v Davies (1887) 36 ChD 359 at 363; Fitch v Dewes [1921] 2 AC 158; Routh v Jones [1947] 1 All ER 179 at 180; Whitehill v Bradford [1952] 1 Ch 236 at 245; Cf Christie *Jur Rev* 294 but today it will be different.

Chapter 2

Theoretical orientation of the restraint of trade doctrine

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1. Doctrinal positioning of the restraint of trade doctrine

It will have to be determined how the restraint of trade doctrine, as a corpus of rules and principles, is classified in England, Scotland and South Africa. The positioning of the doctrine and its significance in the English mother system will first be discerned and the approach in the other legal systems will thereafter be compared with it.

2. English law

The doctrinal positioning of the restraint of trade doctrine in English law is settled. When pressed most English lawyers will admit that the doctrine is a more specific expression of public policy [1]. All the major textbook writers, as a matter of organisation, group the restraint of trade doctrine under the heading public policy [2].

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[1]. Morris v Colman (1812) 18 Ves Jun 437 at 438; Mallan v May (1843) 11 M & W 653 at 665; Rannie v Irvine (1844) 7 Man & G 969 at 976; Hilton v Eckersley (1855) 6 El & Bl 47 at 53, 64, 66; Leather Cloth Co v Lorsont (1869) LR 9 Eq 345 at 354; Davies v Davies (1887) 36 ChD 359 at 364; Mogul Steamship Co Ltd v McGregor Gow & Co [1891] AC 25 at 39, 42, 45, See Winfield 93; Nordenfelt 552, 553, 554, 562, 564, 565, 566; Tivoli Manchester (Ltd) v Colley (1904) 20 TLR 437 at 438; Mouchel v William Cubitt & Co (1907) 24 RPC 194 at 200-201; Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 367, 368, 369; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 766, 768, 770; Attorney General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 794, 797, 800; Continental Tyre and Rubber (Great Britain) Co Ltd v Heath (1913) 29 TLR 308 at 310; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 469, 476, 477; Mason 733 and the discussion of Nordenfelt, 734, 738-739, 740; Herbert Morris 699, 706; Horwood v Millar's Timber and Trading Co Ltd [1917] 1 KB 305 at 310, 311, 312; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 11, 24, 26; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 571, 581, 583-584, 587, 588, 592, 596, 598; Rawlings v General Trading Co [1921] 1 KB 635 at 643, 645, 647, 651; Fitch v Dewes [1921] 2 AC 158 at 162; Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 804, 806, 809; Gaumont-British Picture Corp Ltd v Alexander [1936] 2 All ER 1686 at 1690, 1691-1692; Imperial Tobacco Co Ltd v Parslay [1936] 2 All ER 515 at 522; Triplex Safety Glass Co v Scorah [1938] 1 Ch 211 at 215; King v Michael Faraday and Partners Ltd [1939] 2 KB 753 at 763-764; Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 117; Esso at 298, 304, 305, 318, 324, 325, 330, 331, 333, 340, 341; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 12; SW Strange Ltd v Mann [1965] 1 WLR 629 at 638; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1422; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 282; Peyton v Mindham [1972] 1 WLR 8 at 14; Instone v A Schroeder Music Publishing Co Ltd [1974] 1 All ER 171 at 176, 177, 178, A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 621, 623 but see infra; Luck v Davenport-Smith [1977] EG 73 at 85; Shell (UK) Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 492, 493 with reference to the court a quo; Spencer v Marchington [1988] IRLR 392 at 396; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 485 at 486; R v General Medical Council, ex parte Colman [1990] 1 All ER 489 at 508; Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 155; JA Mont (UK) Ltd v Mills [1993] FSR 577 at 587; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 316, 317; Anson 321; Cheshire Fifoot and Furmston 397, 404, 405; Chitty 1199, 1190 with reference to Holdsworth *History of English Law* vol 8 at 56-62, Chitty 1199; Collinge 412; Winfield 86; Guest 6-7; Gurry 205; Haslam 92; Hickling 32; Heydon 270; Heydon *McGill* 331; Sales 601; Cf Magna Alloys 887-888 infra.

[2]. Cheshire Fifoot and Furmston 393 and 397; Anson 321; Chitty 1190; Cf Treitel 387 but he was still conscious of the link between the doctrine and his reasons for discussing it separately are pragmatic 378.

Some authorities have submitted that an unacceptable restraint of trade will be contrary to public policy and therefore *illegal* [3]. However, many have ascribed a narrower meaning to that word [4]. There is a line of authority that restraints are *void* rather than illegal [5]. This distinction is drawn in an attempt to demarcate different degrees of public policy, a laudable purpose, but the terminology used is unfortunate [6].

- The word void straddles the whole law of contract and it is confusing to attempt to give it a specific meaning here.
- The consequences of contracts that are contrary to public policy are too diverse to be pinned down into two categories.
- It is doubtful whether unacceptable restraints are actually void [7].

It is accepted in the other legal systems under discussion that unacceptable restraints are illegal. The term illegality will, nevertheless, be avoided as far as possible in discussions of English law because of the above mentioned confusion. But it is simply a matter of terminology. This does not mean that the doctrine in England is different from its Scots and South African counterparts.

How then, should unacceptable restraints be labelled? Some courts have maintained that restraints are unlawful [8], but this is also problematic. The word unlawful has delictual or criminal law connotations that should be avoided [9]. It is not a term which is widely used in this field. Restraints that are unacceptable will therefore be called *ineffective*, in an attempt to avoid confusion in English law discussions.

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[3]. Hilton v Eckersley (1855) 6 El & Bl 47 at 59; Urmston v Whitelegg Bros (1890) 63 LT 455 at 456; Mogul Steamship Co Ltd v McGregor Gow & Co [1891] AC 25 at 45-46; Dowden & Pook Ltd v Pook [1904] 1 KB 45 at 53; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 469, 471, 476, 477, 478, 480, 481; Horwood v Millar's Timber and Trading Co Ltd [1917] 1 KB 305 at 312; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 571, 582; Rawlings v General Trading Co [1921] 1 KB 635 at 645, 646, 652; Triplex Safety Glass Co v Scorah [1938] 1 Ch 211 at 215; See Anson 293ff; Farwell 66, 67, 69; Treitel 377ff; Beale Bishop and Furmston 745, 776.

[4]. Green v Price (1845) 13 M & W 695 at 699; Hilton v Eckersley (1855) 6 El & Bl 47 at 53, See also 57, But cf 62 and 64; Baines v Geary (1887) 35 ChD 154 at 156; Mogul Steamship Co Ltd v McGregor Gow & Co [1891] AC 25. See narrower 42, 50-51, 57, 58, See Treitel 387, See Mogul a quo (1889) 23 QBD 598 at 619; R v General Medical Council , ex parte Colman [1990] 1 All ER 489 at 508; Collinge 411; See Vester & Gardner 32, Wedderburn 521-522.

[5]. Price v Green (1847) 16 M & W 346 at 353; Bennet v Bennet [1952] 1 KB 249 at 260; Cheshire Fifoot and Furmston 358-360 the author is the primary advocate of this theory although he accepted that it has some problems 360, 392, 393.

[6]. Atiyah 337; (Anson 292) See the criticism by Treitel 377-378.

[7]. Infra Ch 12.

[8]. Mallan v May (1843) 11 M & W 653 at 664, 669; Jacoby v Whitmore (1883) 49 LT 335 at 337; Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1954) 71 RPC 1 at 10; SW Strange Ltd v Mann [1965] 1 WLR 629 at 638; Fyffes plc v Chiquita Brands International Inc [1993] FSR 83 at 105.

[9]. Mogul Steamship Co Ltd v McGregor Gow & Co [1891] AC 25 at 39; Attorney General of the Commonwealth of Australia v Adelaide Steamship Co [1913] AC 781 at 797; Rawlings v General Trading Co [1921] 1 KB 635 at 643; Brekkes Ltd v Cattel [1972] 1 Ch 105 at 115; Collinge 411; Whish *Stair Encyclopaedia* 1214; See Vester & Gardner 32, Wedderburn 521-522.

2.1. Obstacles between public policy and the restraint of trade doctrine

The connection between public policy and restraints of trade has not been as pivotal as the above authorities would suggest. Many cases do not even refer to the public policy basis of the doctrine. Authorities such as Heydon [10] do not always show that its significance has been appreciated. Some aspects will isolate the doctrine from its public policy roots, despite the ostensible link between the two.

Historically the categorisation of the restraint of trade doctrine under the rubric of public policy is not as strong as has been generally supposed. It is stated that the doctrine has been related to public policy since Elizabethan times [11], but this must be qualified.

- The early cases contain expressions that seem public policy-oriented [12] but public policy was not, initially, a concept which lawyers used consciously and it was not specifically defined in English law [13]. The only real connection between early expressions of public policy in restraint of trade cases and modern principles of public policy is that restraint of trade law, in retrospect, formed a foundation of latter-day public policy [14]. Public policy notions as they are understood today only developed in the later 18th century [15]. A restraint of trade doctrine tied to a thoroughly modern concept of public policy only came to the fore in the 19th century [16].
- The notion of public policy as a separate and autonomous legal concept underlying the doctrine accordingly only evolved after the restraint of trade doctrine had become fixed in English law. It was often a case of the tail wagging the dog. The restraint of trade doctrine contributed more to the establishment of the principle of public policy than vice versa [17]. The restraint of trade doctrine has been the most virile area of public policy.
- Courts, in developing the doctrine, initially did not emphasise only public policy as a basis for the doctrine. Other pegs on which to hang it, such as the notion of adequate consideration,

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10. Cf Heydon 270ff although he did no clear analysis of the full role of public policy.
11. Winfield 85; Winfield (1946) 285; Cheshire Fifoot and Furmston 357.
12. Dyer's Case (1414) 2 YB Hen 5, Pasch pl 26 "encounter common ley"; Anon (1586) Moore 242 "encounter le ley ... encounter le necessity del commonwealth"; Colgate v Bachelor (1602) Cro Eliz 872 "against the benefit of the commonwealth"; Bragge v Stanner Palm 172 "covenant ou condition encounter Ley"; Winfield (1946) 285; Mitchel v Reynolds (1711) 1 PWms 181 183 "against the policy of the common law", 187 "against the policy law", See Winfield 85, Knight 208; Ward v Byrne (1839) 5 M & W 548 at 559, 561, 563 "against general policy".
13. Knight 207-208.
14. Knight 207-208; Winfield 83.
15. Knight 208-210; Cf Winfield 85ff and Cheshire Fifoot and Furmston 357.
16. Knight 208.
17. See Beale Bishop and Furmston 748; Winfield 76.

were also mooted [18]. Most of these issues have now been absorbed in the public policy doctrine but they played an important historical role.

Remnants of this historical development survive in the modern doctrine.

Some aspects of the test for the effectiveness of restraints lead to the marginalisation of the notion that the doctrine is a more specific expression of public policy.

- Reasonableness inter partes plays an important role in restraint of trade law, and some authorities have found it difficult to relate this concept to public policy [19].
- The proliferation of highly technical rules, especially in post-employment restraints and restraints in sales of goodwill, has wedged in between the doctrine and its public policy roots. The doctrine consists of a multitude of specific rules and principles that exert centrifugal forces upon it. It has been stated that "The principle as to covenants in restraint of trade has so clearly precipitated itself that occasionally judges do not think it worth while to state that its foundation is public policy [20]".

The doctrine of restraint of trade is still not fully embraced by the principles of public policy. The impression that public policy lies at the basis of the doctrine is often created by courts and textbook writers but frequently only as an afterthought for the sake of systemic tidiness.

2.2. The Winfield approach

There is an uneasy alliance between the restraint of trade doctrine and the principle that contracts should not be contrary to public policy. Winfield stated that public policy can take on one of three different forms [21]. On the one hand some issues of public policy never crystallise into any clear rules or acid tests. The courts decide such cases by looking at the broad principles of public policy. On the other hand more specific rules and principles, on the basis of which public policy issues can be decided, may develop, and this category can again be subdivided. At the one pole the rules may become so independent and separate that the only link between the body of rules and the notion public policy will be historical. At the other end the rules may remain in the shadow of public policy. In this last mentioned class there will be a continuing interaction between the body of rules and the principles of public policy in general. Winfield argued that the restraint of trade doctrine is an example of this and it appears to be the most accurate description of the relationship between

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18. See Mitchel v Reynolds (1711) PWms 181 discussed infra Ch 9.9, Chitty 1190; Cf Ward v Byrne (1839) 5 M & W 548 at 559; Cf Heydon 25 and the criticism infra Ch 5.3.
19. Infra Ch 5.3.
20. Winfield 96 with reference to Neville v Dominion of Canada News Co Ltd [1915] 3 KB 556.
21. Winfield 96 from Rodriguez v Speyer Bros [1919] AC 59 at 77-81.

the doctrine and public policy.

2.3. Impact of the doctrine as a specific expression of public policy

The doctrine not only grew out of public policy, but is still regarded as a specific expression of it. The specific rules and principles underlying the doctrine will also be related to public policy.

Public policy is a concept that is flexible and difficult to pin down even if the variability of it over time is ignored [22]. The amorphous nature of the concept has always been one of its important features. Pliability is also an important characteristic of the restraint of trade doctrine based on public policy values. It is more precise and it concerns more specific public policy principles, but it is still not specific. The Winfield approach will ensure that this is recognised despite the proliferation of specific rules and principles.

Public policy impacts upon the angle from which restraint of trade issues should be approached. The public policy basis of the doctrine has continued to play a particularly important role in problematic cases where new ground is being broken [23].

The public policy basis is most fundamental on the level of variability. Substantive and attitudinal variability will be discerned although it may exist on several different levels.

On the one hand public policy, in the substantive sense, is variable over time [24]. This is inevitable. Over time courts will change their views on public policy. It is made up of societal values which are in constant flux. Variability is not one of the negative aspects of public policy but it is this element that continuously invigorates it in a changing society. Winfield stated that variability "is a stone in the edifice of the doctrine [of public policy] and not a missile to be flung at it" [25].

Public policy is subject to change and the restraint of trade doctrine should be sensitive to its

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22. Davies v Davies (1887) 36 ChD 359 at 364; Enderby Town Football Club Ltd v The Football Association Ltd [1971] 1 All ER 215 at 219; Esso 331; Anson 307; Cheshire Fifoot and Furmston 358; Chitty 1133; Bell *Policy Arguments in Judicial Decisions* (1983) Chapter VI.

23. North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 469; See e.g. Esso supra 2.1.

24. Davies v Davies (1887) 36 ChD 359 at 364, 396-397, See Knight 214; Maxim-Nordenfelt Guns and Ammunition Co Ltd v Nordenfelt [1893] 1 Ch 630 at 665, Cf Trimble v Jameson & Co (1903) 24 NLR 53 at 55 where this point was also made in South Africa; Dubowski & Sons v Goldstein [1896] 1 QB 478 at 484; English Hop Growers Ltd v Dering [1928] 2 KB 174 at 185; Gilford Motor Co Ltd v Horne [1933] 1 Ch 935 at 957-958; Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181 at 189; Nagle v Feilden [1966] 2 WLR 1027 at 1037, See Anson 308; Esso 325; Beale Bishop and Furmston 751; Cheshire Fifoot and Furmston 358, 360, 397; Chitty 16-003, 16-004; Guest 6-7; Gurry 205; Winfield 93-94.

25. Winfield 95.

gravitational pull. It is unavoidable that the flexibility and variability of the doctrine will be muted by its specificity and its apparent independence from public policy. But the doctrine should not become stultified. Its continued attachment to public policy along the lines proposed by Winfield ensures that its fluidity and flexibility over time is not completely eclipsed by specific rules [26]. The attachment to public policy will neutralise the harshest effects of the precedent system in restraint of trade cases [27]. Hence stare decisis will be important in an area such as this where some separation from public policy has occurred, but courts should not be as rigid as in other fields of law [28]. Continuous though controlled flux will be ensured if the doctrine is not divorced from public policy.

Judicial attitudes towards public policy have changed over the years [29], and these changes should impact upon it. A conservative attitude towards public policy will rub off on the restraint of trade doctrine [30], while a more positive attitude towards public policy in general should in turn manifest in a more activist approach towards the doctrine. This should impact on both the attitude towards restraints and the rules and principles that constitute the restraint of trade doctrine. The interaction can only be properly facilitated if the doctrine is viewed against its public policy background.

3. South African law

Many cases simply state that public policy lies at the basis of the doctrine in South Africa [31], and it

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[26]. Davies v Davies (1887) 36 ChD 359 at 364, 396-397; Urmston v Whitelegg Bros (1890) 63 LT 455; Maxim-Nordenfelt Guns and Ammunition Co Ltd v Nordenfelt [1893] 1 Ch 630 at 666; Attwood v Lamont [1920] 3 KB 571 at 581; English Hop Growers Ltd v Dering [1928] 2 KB 174 at 185; Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181 at 189, PVB 310; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1229; Esso 325; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 320; Anson 319; Cheshire Fifoot and Furmston 397, 406; Gurry 205; Hickling 33; Winfield 94.

[27]. Davies v Davies (1887) 36 ChD 359 at 396-397; Nordenfelt 553-554; Mason 733; Cheshire Fifoot and Furmston 360; HG Beale WD Bishop and MP Furmston *Contract: Cases and Material* first ed (1985) 628 although the point is not again made in the second edition.

[28]. Badische Anilin and Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 451; Cf Attwood v Lamont [1920] 3 KB 571 at 581-582 where the precedent system was regarded as a considerable obstacle; Anson 308; Heydon 72 is too strict.

[29]. Anson 307.

[30]. Hilton v Eckersley (1855) 6 El & Bl 47 at 64; The negative attitude towards public policy was carried through to the restraint of trade doctrine in Mogul Steamship Co Ltd v McGregor Gow & Co [1891] AC 25 at 45, See Anson 292.

[31]. SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 367, 368, 371; Federal Insurance Corp of SA Ltd v Van Almelo (1908) 25 SC 940, at 944, 945; Bathurst Farmers' Union v Bradfield 1923 EDL 391 at 397; Trimble v Jameson & Co (1903) 24 NLR 53 especially 61, 62; Gordon v Van Blerk 1927 TPD 770 at 773; African Theatres Ltd v D'Oliviera 1927 WLD 122 at 127; Halliwell v Laverack 1929 WLD 175 at 180; Durban Rickshas Ltd v Ball 1933 NPD 479 at 493; New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 82 with reference to Herbert Morris 706-707, Referred to Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140 at 151, See also 155; Wilkinson v Wiggill 1939 NPD 4 at 16; Park Gebou-Belleggings en Wynkelders Bpk v Rogers and Hart (Pty) Ltd 1954 (3) SA 109 (T) 116; Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 501; Spa

is generally accepted that contracts which are unacceptable in terms of the doctrine are illegal. Most authors in South Africa contend that some contracts are ineffective on the basis of illegality and then distinguish different sources of illegality, including public policy [32]. The rules and principles applying to restraint of trade clauses are described as more specific manifestations of public policy [33]. Public policy has been paramount in settling and developing restraint of trade rules and principles.

3.1. Public policy as a basis for importing the restraint of trade doctrine

The earliest South African cases [34] on restraint of trade are difficult to interpret. No justification or full explanation of the rules and principles was given, although English influences were already evident in the terminology used [35]. The initial approach is in many ways reminiscent of the Scottish development [36].

In some cases courts simply contended that the English law applied in this area [37]. But this is not the view generally taken. Some of the debates concerning the doctrine in South Africa are therefore misconceived. Authorities have devoted considerable time and effort to the question whether South African courts are free to modify the English law doctrine in South Africa [38]. Yet, a restraint of trade rule or principle cannot be applicable in South Africa simply because it applies in English law [39].

Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 717; Filmer v Van Straaten 1965 (2) SA 575 (W) 578; Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W) 309; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198; BN Aitken (Pty) Ltd v Tamarillo (Pty) Ltd 1979 (4) SA 1063 (N); Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330, 331, 333; A Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A) 417, See the criticism Magna Alloys 889; Petre & Madco (Pty) Ltd v Sanderson-Kasner (1984) 3 SA 850 (W) 858; Cf Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 786 see also infra.

32. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 8, Kerr 150ff; Lubbe and Murray 237.

33. De Wet & Yeats 81; Christie 409; Lubbe and Murray 237; Van der Merwe 139ff.

34. Willet v Blake (1848) 3 Menzies 343, Stephan Bros v Loubscher (1877) 7 Buch 137, Hendriks v Doorasamy (1898) 13 EDC 25; See Kahn 394, Oosthuizen 382.

35. Christie (1981) 352.

36. Compare Willet v Blake (1848) 3 Menz 343 with Stalker v Carmichael 1735 M 9455.

37. Durban Rickshas Ltd v Ball 1933 NPD 479 at 489 where English authorities were referred to as "the authorities"; See the extensive reference to English cases without any real justification in New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 82; Holmes v Goodall and Williams Ltd 1936 CPD 35 at 42; It seems however that this was exaggerated by the critics: Van De Pol v Silbermann 1952 (2) SA 561 (A) 569, Magna Alloys 886, 888, *Annual Survey* (1984) 129, See Kahn 396, Suzman 91.

38. Katz v Efthimiou 1948 (4) SA 603 (O) 610; Van De Pol v Silbermann 1952 (2) SA 561 (A) 569 and Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) 439; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 103; Tilney v Rock and Way 1928 EDL 108 at 111-112; Aronstam 21; Christie (1981) 353.

39. Federal Insurance Corp of SA Ltd v Van Almelo (1908) 25 SC 940 at 943; Diamond Cycle and Motor Works Ltd v Hirschmann 1916 TPD 241; Tilney v Rock and Way 1928 EDL 108 at 111; SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd 1968 (2) SA 777 (D) 781, See Kahn 393; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1102.

Other courts simply stated that the doctrine was taken over from English law [40]. The rules and principles of the restraint of trade doctrine have certainly been taken over from English law. But statements of this nature need to be qualified. It is wrong simply to maintain that the doctrine is foreign and engrafted onto South African law (if by "foreign" and "engrafted" is meant borrowed without reference to systemic considerations and contextual harmonisation) [41].

Courts soon made one fundamental connection. Excerpts on public policy from the Digest [42] and the Roman-Dutch writer Voet [43], were taken as the authentic soil into which the English doctrine could be transplanted. The Roman-Dutch notion of public policy became the basis on which the restraint of trade doctrine was cemented onto South African law.

Some authorities suggested that courts were merely building on the ideas of Voet as if the author impliedly included restraints of trade in his concept of public policy [44]. But the Roman-Dutch concept of public policy at the time of its development did not include a clear restraint of trade doctrine [45]. Most authorities were conscious of this and did not base the incorporation of the doctrine on this ground. The South African doctrine cannot be effectively criticised on the basis that it took the incorrect view that the doctrine also existed in Roman-Dutch law [46]. The doctrine in South Africa cannot merely be rejected on historical grounds because it was not accepted

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[40]. Durban Rickshas Ltd v Ball 1933 NPD 479 at 489, 495; Lewin v Sanders 1937 SR 147 at 148; Katz v Efthimiou 1948 (4) SA 603 (O) 610, See Drewtons v Carlie 1981 (4) SA 305 (C) 310 where the view expressed here is followed; Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 717; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 103; Roffey v Catterall, Edwards & Goudrè (Pty) Ltd 1977 (4) SA 494 (N) 502-503, See Coenraad Visser *The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law with Specific Reference to Contracts in Restraint of Trade* (1984) 641 although his final solution is unhelpful; Otto 209; Aronstam 21; Oosthuizen 383.

[41]. Kerr (1982) 184-185 and the criticism of Katz v Efthimiou 1948 (4) SA 603 (O) 610.

[42]. D 35.1.71.2; Cf also on the roots of a restraint of trade principle in Roman law Wacke "Wettbewerbsfreiheit und Konkurentzverbotsklauseln im antiken und modernen Recht" 1982 *Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte* Romanist Abt 91 188 translated in the *Law and History Review* (1993) 1.

[43]. Voet 2.14.16. where the author stated that promises, which were contrary to law or public policy could not sustain contractual claims and where he argued that promises in restraint of marriage were invalid, See Lubbe and Murray 238ff.

[44]. KWV v ZA Bpk v Botha 1923 CPD 429 at 434; See Christie (1981) 353.

[45]. Edgcombe v Hodgson (1902) 19 SC 224 at 226, mentioned Federal Insurance Corp of SA Ltd v Van Almelo (1908) 25 SC 940 at 943; Katz v Efthimiou 1948 (4) SA 603 (O) 610. See however the court talked of Roman-Dutch systems of law; Van De Pol v Silbermann 1952 (2) SA 561 (A) 569; Diner v Carpet Manufacturers Co of SA Ltd 1969 (2) 101 (D) 103; SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd 1968 (2) SA 777 (D) 781; Roffey v Catterall Edwards and Goudre (Pty) Ltd 1977 (4) SA 494 (N) 502; Drewtons v Carlie 1981 (4) SA 305 (C) 310; Magna Alloys 890-891; *Annual Survey* (1962) 112; *Annual Survey* (1984) 129; Aronstam 22; Christie (1981) 353; Christie 433; Du Plessis & Davis 95; Kahn 398 and the Roman-Dutch cases mentioned; Kerr (1982) 184; Kerr *Tribute* 192; Oosthuizen 382; Wessels vol 1 539.

[46]. Too much emphasis was placed on this: Christie (1981) 353, Drewtons v Carlie 1981 (4) SA 305 (C) 310, Oosthuizen 382.

primarily on such grounds [47].

The doctrine is most accurately anchored in South Africa via the Roman-Dutch *principle* that contracts which are contrary to public policy are illegal though the public policy *values* are contemporary [48]. Courts accepted that a contract would be contrary to the Roman-Dutch concept of public policy if it interfered with contemporary public policy values and they agreed that a specific illegal restraint of trade offended against such public policy values [49].

The so-called Winfield approach towards the relationship between public policy and the restraint of trade doctrine became settled in South African [50]. The South African principle of public policy provided the basis for the doctrine, but the rules and principles as copied from English law were regarded as a contemporary expression of public policy in terms of which restraint of trade cases could be adjudicated. This approach was consolidated in the cases [51].

3.2. Public policy as a factual issue

In *Drewtons* [52] Van den Heever J put forward a revolutionary notion of public policy [53]. She contended that problems regarding public policy were merely factual [54]. She refused to accept that there were general principles or policy considerations on the basis of which restraint of trade cases could be adjudicated. Accordingly she denied that there was a need for a restraint of trade *doctrine* [55]:

> "I can think of no reason why what is and should remain a factual inquiry should be elevated to a rule of law; particularly when a decision in the United Kingdom as to

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47. Roffey v Catterall, Edwards & Goudrè (Pty) Ltd 1977 (4) SA 494 (N) 503-504 cannot be accepted, See infra Ch 5.2.1.
48. Cf Coenraad Visser *The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law with Specific Reference to Contracts in Restraint of Trade* (1984) 641 thought it could be based on the clausula rebus sic stantibus but this is unhelpful.
49. Edgcombe v Hodgson (1902) 19 SC 224 at 226, See the references: Federal Insurance Corp of SA Ltd v Van Almelo (1908) 25 SC 940, Tilney infra, Diamond Cycle infra, See Oosthuizen 282 did not understand this argument, See Christie (1981) 353; Diamond Cycle and Motor Works Ltd v Hirschmann 1916 TPD 241 at 245; Dempsey v Shambo 1936 EDL 330 at 333; Tilney v Rock and Way 1928 EDL 108 at 111-112; Brooks and Wynberg v New United Yeast Distributors (Pty) Ltd 1936 TPD 296 at 304, See Kahn 396; SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd 1968 (2) SA 777 (D) 781, See the discussion of these cases Kahn 396; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1099; Wessels 2nd ed vol 1 183; Du Plessis & Davis 95.
50. See Van der Merwe 144.
51. Especially Trimble v Jameson (1903) 24 NLR 53 at 58, Tilney v Rock and Way 1928 EDL 108 at 111.
52. Drewtons v Carlie 1981 (4) SA 305 (C).
53. Schoombee 132.
54. Drewtons v Carlie 1981 (4) SA 305 (C) 311.
55. Drewtons v Carlie 1981 (4) SA 305 (C) 311, 312.

> what will detrimentally affect the interest of the community is not necessarily valid for a community differently constituted and circumstanced, thousands of kilometres away. And dubbing the result of a factual enquiry a legal doctrine does not necessarily alter its nature, particularly since our Provincial Divisions have no legislative authority".

The statement essentially refutes the existence of public policy. But the notion that a contract can be emasculated on the basis of *public policy*, with the emphasis on *policy* as opposed to merely public interest, has been accepted in South African law almost since its inception, and even Roman-Dutch authority can be found for it. Contracts can be ineffective because they offend certain fundamental policy considerations. It is not necessary or possible to look at the actual interests of the public in every case. Public policy concerns normative notions of what would be in the best interests of the public [56]. Experience of courts in a specific field is elevated to a method for solving certain types of problems and legal principles are distilled. Van den Heever J overlooked the pragmatic importance of laying down more concrete principles and rules upon the basis of which courts can decide difficult issues regarding the interest of the public [57]. Public policy principles are related to factual situations; courts will continuously have to evaluate principles to see if they still actually defend what is regarded as the interests of the public, but that does not mean that public policy is a factual issue. The judge does not refer to any authority that supports her point [58]. Most cases illustrate that the ideas expressed in *Drewtons* have not been accepted, although there are no explicit judicial rejections of the decision [59].

3.3. Utilising the Winfield approach to re-align the doctrine with South African public policy

The only valid criticism against the courts in receiving the doctrine in South Africa is that they did not properly appreciate the significance of the Roman-Dutch public policy milieu in earlier cases [60]. The restraint of trade doctrine in South Africa had been forged on the basis of public policy, but was more than lip service paid to South African public policy? In the late 1960s the Provincial

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56. Kerr (1982) 184; Schoombee 133, 139.
57. Cf the discussion of stare decisis in Drewtons.
58. Van den Heever J referred to an article written by her father under the pseudonym Aquilius (1941) 43 but Aquilius was discussing variability of public policy and he cannot be interpreted as supporting her thesis; Cf Tilney v Rock and Way 1928 EDL 108 at 111, Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 486, Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 (1) SA 807 (W) 824 although none of these cases give strong support to it.
59. Schoombee 133, 138-139; Magna Alloys 897; Lubbe & Murray 241 gave a more acceptable explanation of how these principles operate; Van der Merwe 139-140, 145.
60. Kahn 393.

courts started to utilise the public policy foundation of the doctrine in an attempt to harmonise the doctrine with what they regarded as actual South African public policy [61]. They felt that the doctrine did not fully coincide with South African public policy, but did not deny that some restraints would be illegal, and they did not undermine the notion that this would be measured by looking at more specific rules [62].

The movement culminated in the watershed *Magna Alloys* judgment in 1984 [63]. It was accepted that some restraints were still illegal [64]. It was stated that restraint of trade problems had to be dealt with in terms of South African principles of public policy [65]. However, the court did not really discuss the principles that made South African law different from English law (though it was admitted that public policy also lies at the basis of English law [66]), and the case is opaque [67] in laying down more specific rules. It is difficult to determine whether Rabie CJ thought that the second tier of the Winfield approach should be maintained. Public policy was stressed and scant reference was made to particular rules and principles by which the illegality of restraints was determined in the past [68]. The court did not seem to feel a great need for concretising broad statements into more specific rules and principles. But Rabie CJ in the end probably still accepted a two-tier test, albeit with a much reduced second tier. The emphasis on public policy was probably only made in an attempt to alter particular long accepted principles and rules [69].

Some cases immediately following *Magna Alloys* placed much emphasis on public policy [70]. But later cases again utilised a more specific doctrine [71]. *Magna Alloys* is often quoted, but the more specific doctrine has mostly been revitalised, albeit within the framework where public policy has been enhanced. A somewhat different doctrine is still, in South Africa, couched in slightly different Winfield terms.

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61. Katz v Efthimiou 1948 (4) SA 603 (O) 610 may also be open to this interpretation, See Kerr (1982) 184; SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd 1968 (2) SA 777 (D) 787; Roffey v Catterall, Edwards & Goudrè (Pty) Ltd 1977 (4) SA 494 (N) 503ff, See Nathan 37; Madoo (Pty) Ltd v Wallace 1979 (2) SA 957 (T) 957; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 405; Kahn 398, 399; Nathan 36 although it is not clear whether the author was talking about contemporary or historical Roman-Dutch policy.
62. Schoombee 132; See infra Ch 5 and 6; Cf Botha J in National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1099 accepted that only few changes should be made if at all.
63. But see infra Ch 10.
64. Magna Alloys 891; Christie 433.
65. Magna Alloys 892ff and the authorities quoted there. See Interest Computation Experts v Nel 1995 (1) SA 174 (T) 179; Basson v Chilwan 1993 (3) SA 742 (A) 762.
66. Magna Alloys 888 and 892.
67. Schoombee 139 see infra Ch 5.3.
68. Magna Alloys 892 found support in Otto 211 who proposed a monolithic approach.
69. Infra Ch 5, 6, 11-14.
70. Amalgamated Retail Ltd v Spark 1991 (2) SA 143 (SEC) 150; Cf Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 (1) SA 807 (W) 824; Van der Merwe 158.
71. See infra 5.2.1; Christie 433.

3.3.1. The consequence of the new South African approach towards public policy and restraints of trade

In South African law there is now less of a restraint of trade doctrine interposed between restraint clauses and public policy than in England and Scotland. All consequences of the law of restraint of trade are portrayed as flowing directly from public policy. In most respects the consequences of the public policy connection discussed with reference to English law will also be evident in South Africa. The only difference will probably be that these consequences will be more pronounced because the link between public policy and restraint of trade is more direct.

It has been accepted that public policy will change and that this must be absorbed by the doctrine [72]. Despite some conservatism [73], most South African courts have accepted that the role of stare decisis will be reduced in restraint of trade cases since the doctrine is an expression of public policy [74]. But stare decisis will still play a considerable role and it is open to question whether the direct significance of public policy will be maintained as a new set of technical rules and principles becomes established [75]. Du Plessis and Davis [76] highlight the role of the relative importance of interventionism and laissez-faire in the sphere of public policy. In *Basson* [77], Botha J suggested that it would be useless to look at pronunciations in cases that concern other public policy aspects which are to the effect that a court will be reluctant to interfere with contracts. But the general attitude of courts to other public policy issues may be important in determining the general attitude of the courts to restraints [78].

4. Scots Law

In Scotland it is also accepted that the restraint of trade doctrine is an expression of public policy. When a contract is found wanting in terms of the doctrine of restraint of trade, such a contract

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72. For pre-Magna cases see: SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 367-368, Dempsey v Shambo 1936 EDL 330 at 333, Trimble v Jameson & Co (1903) 24 NLR 53 at 55; Magna Alloys 891; Basson v Chilwan 1993 (3) SA 742 (A) 762; Kerr (1982) 185; Lubbe (1990) 11; See Lubbe & Murray 240 -241 with reference to Magna Alloys, 241; Van der Merwe 158; Drewtons v Carlie 1981 (4) SA 305 (C) 311, 312 public policy requirements may differ in different parts of a country, Oosthuizen 382.

73. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1100-1109; Du Plessis & Davis 95.

74. Roffey v Catterall Edwards and Goudre (Pty) Ltd 1977 (4) SA 494 (N) 506, Aronstam 24; Cf Drewtons v Carlie 1981 (4) SA 305 (C) 310, See the criticism Schoombee 133, See supra.

75. See Du Plessis and Davis 91.

76. Du Plessis and Davis 97-98; Cf also SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 367-368, 371.

77. Basson v Chilwan 1993 (3) SA 742 (A) 776-777.

78. Basson 762 and the criticism of Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 9 must be approached with caution.

term is normally described as illegal or as a pactum illicitum [79] on the grounds of public policy [80], and there is also criticism of the use of the word unlawful in this context [81]. Most contract authors have classed the doctrine with other aspects of illegality or pactum illicitum on the grounds of public policy [82].

4.1. Walker and the case of George Walker: a conflicting approach

However, Scots lawyers are not unanimous when it comes to the doctrinal positioning of the restraint of trade doctrine. Walker distinguishes three related grounds: public policy, illegality, and contracts that will not be enforced for a variety of reasons. He then refrains from following the orthodox approach of defining the restraint of trade doctrine as a specific expression of public policy [83]. He classes the restraint of trade doctrine under a further rubric, "contracts not enforced for a variety of reasons" [84].

Normally authors combine the three notions of illegality, public policy, and the restraint of trade doctrine in some way. But Walker's reason for making this trilateral distinction is obscure. One seeks in vain for a definition of illegality. Public policy is defined as a ground upon which contracts can be avoided if they "are not strictly illegal" [85]. He provides no reason for not categorising the restraint of trade doctrine under the heading "public policy". He refers to some of the Scots institutional writers but none of them support his thesis [86].

It is accordingly very difficult to establish why he has categorised the restraint of trade doctrine in

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79. Watson v Neuffert (1863) 1 M 1110 at 1112; Barr v Carr 1766 M 9564; McKernan v United Operative Masons' Association of Scotland (1874) 1 R 453 at 457, 459, 460, 461; McGahie v Union of Shop Distributive and Allied Workers 1966 SLT 74; Pratt v Maclean 1927 SN 161 at 162 and the submissions of counsel; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 152, 154, 157, 155; BMTA v Gray 1951 SC 586 at 604, MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95 at 98, 99; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; Randev v Pattar 1985 SLT 270 at 271; Campbell 281; McBryde *Thesis* 150; Gloag 121, 569, 570, 575-576.

80. Stewart v Stewart (1899) 1 F 1158 at 1161, 1162, 1163, 1171, 1172; Mulvein v Murray 1908 SC 528 at 533; Kennedy v Clark ([1917) 33 ShCt Rep 136 at 138 and the manner in which the case was argued; Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd 1939 SC 788 at 796 and 797 where unlawfulness is also mentioned; BMTA v Gray 1951 SC 586 at 598; Kilgour v McNicol 1961 SLT ShCt 8 at 9; MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95 at 100; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; Letinvest plc v The Victor Tramway Ltd 1994 SCLR 164 at 165; Campbell 281, 282; More in his notes to Stair (1832) lxiv; Gloag 121, 564-565 and 569; McBryde 602, 608; Whish *Stair Encyclopaedia* 1208.

81. McBryde *Thesis* 152.

82. Bell Prin (10th ed) 40 and Comm 7th ed 322; Gloag 565 and 569ff, McBryde 590; McBryde *Thesis* 4.

83. Walker 155 and 167.

84. Walker 174.

85. Walker 167.

86. Bell Com I 322, Prin 40 and Ersk I 7,62.

this manner. He probably attempted to follow certain developments in English law [87]. However, the manner in which he categorises the doctrine still differs materially from the approach of any of the English authors. Most of them still regard public policy as the ground upon which courts refuse to enforce contracts in restraint of trade, although some of them place public policy (and with it restraint of trade) on a different plane from illegal contracts [88]. Walker's typology must be rejected. No cogent reason for departing from established practice can be discerned, and it is not even clear whether the author was aware that he was taking a non-conformist view.

In the recent case of *George Walker* [89] the court also seemed to draw a line between public policy and the restraint of trade doctrine. The respondent sold his business as Messenger at Arms and Sheriff's Officer to the petitioners. In terms of the contract the respondent was then restrained from being involved in the same business in three sheriffdoms. The restrictive covenant was attacked on two grounds. It was argued that the restraint offended against the doctrine. Moreover, counsel for the respondent submitted that the clause was contrary to public policy on grounds unconnected to the restraint of trade doctrine.

The averments of the respondent were based on an Act of Sederunt which placed a duty on Messengers at Arms and Sheriff's Officers not to refuse business from anyone except in circumstances set out by the Act. The respondent accordingly argued that the restraint was ineffective on one of the above mentioned grounds because it would give rise to an obligation to act contrary to his statutory duty.

As far as the restraint of trade goes, the court refused to accept the argument of the respondent because a distinction was drawn between public policy and the doctrine. The court considered the effect of the Act under the broad public policy head. The approach indicates that there is a distinction between public policy and the restraint of trade doctrine.

But the conclusions mentioned must be qualified [90].

- The court never made an explicit statement about the doctrinal positioning of the restraint of trade doctrine.
- The case is also open to another interpretation. Perhaps the court merely intended to distinguish between the restraint of trade doctrine as one manifestation of public policy and other

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87. See supra 2.1.
88. See supra 2.1.
89. George Walker & Co v Jann 1991 SLT 771.
90. See infra Ch 10.5.2.

more general requirements of public policy. Lord Cullen decided [91] that the second ground for ineffectiveness argued by the respondents pertained to the issue of "illegality per se".

The majority of cases and authors on restraint of trade leaves little doubt about the doctrinal positioning of the restraint of trade doctrine. The solitary voice of Walker speaks for a different categorisation, but there is little to commend or support his stance.

4.2. More precise relationship between the restraint of trade doctrine and public policy in Scotland

Up to now, no Scots court has investigated the precise relationship that should exist between the doctrine and public policy in *Scotland*. The restraint of trade doctrine is mostly applied without regard for its theoretical basis.

Moreover, acceptance that the doctrine is an expression of Scots public policy is not always apparent from the Scottish authorities [92]. Courts have never really investigated this point. When a court in Scotland refers to the restraint of trade doctrine as an expression of public policy, it is often only mimicking English law. Public policy is frequently referred to via quotation of the dictum of Lord Macnaghten in *Nordenfelt* [93] supporting the approach that the broad basis on which the validity of restraints should be determined is public policy [94].

It is suggested that Scots courts should make it more explicit that the doctrine is an expression of Scottish public policy. A doctrine that is so related may blend in better with the Scots law of contract and might impact on the doctrine, although it will probably not justify a strong departure from existing principles. Such a distinction is not made obsolete by the political union between Scotland and England. Public policy is endemic to the legal system and the Scots system contains certain features which may have some minimal impact.

4.2.1. Relations between the doctrine and public policy in Scotland

Scots authorities have also not determined how the doctrine should relate to public policy in

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91. George Walker & Co v Jann 1991 SLT 771 at 773.

92 Cf Stewart v Stewart (1899) 1 F 1158 at 1161-1162 discussed Ch 3.3 and Ch 9.6; The doctrine does however now have somewhat of a separate identity in Macintyre v Cleveland Petroleum 1967 SLT 95 at 99-100 the court went no further than stating that it would be apt to give weight to English authorities in the absence of Scots authority; SOS Bureau Ltd Payne 1982 SLT ShCt 33 at 37 where the court held that a certain English principle "seems to accord fully with the equivalent Scottish principles"; See infra Ch 3.3 and Ch 9.5.

93. Nordenfelt 565.

94. BMTA v Gray 1951 SC 586 at 592-593; Mulvein v Murray 1908 SC 528 at 531-532; MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95 at 99; See also Gloag 569.

Scotland. These issues have not been regarded as relevant within the accepted Scottish methodology. On the whole it seems that the relationship between public policy and the restraint of trade doctrine will not be much different from the relationship between these two elements in English law. The doctrine will, even if it is related to Scots public policy, still have considerable independence, because it consists of copious technical and separate rules. The Winfield approach should also apply in Scotland even if some Scottish elements may in future have some impact on the relationship between the different factors.

4.3. The direct consequences of the doctrinal positioning of the restraint of trade doctrine in Scots law

Generally the consequences of the doctrinal positioning of the restraint of trade doctrine will be similar in English and Scots law. Public policy is variable over time [95] and authority of precedent will be diminished by changes in circumstance [96].

Moreover it is hoped that Scots public policy may in future come into its own. Public policy issues in Scotland developed in an atmosphere where sanctity of contract was of much greater importance than in England, and courts might consider whether this should impact on the doctrine [97]. The narrower scope of Scottish public policy might have some influence on the Scots restraint of trade doctrine even though Scots lawyers will probably remain more reluctant to show this, and even though divergencies will probably remain less evident in Scots law than in South Africa where English law has lost some of its status as a major authority.

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95. McBryde 573, 590 with reference to Gloag.
96. McBryde 593-594.
97. McBryde 574.

Chapter 3

The principles underlying the restraint of trade doctrine

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1. The principles underlying the doctrine

The restraint of trade doctrine has survived many changes in legal, social and economic ideas. The fervour with which judges apply it has waxed and waned. However, it is difficult to discern the underlying principles [1], as they are sometimes lost in the haze of technical rules. Clearly the courts feel that the doctrine satisfies some sense of justice but they are vague in expressing it.

2. A clash of principles

The restraint of trade doctrine is aimed at resolving the clash between conflicting public policy principles. Van den Heever J in *Drewtons* [2] stated that restraint cases only involve "factual" issues, but this cannot be accepted. Legal principles underlie the doctrine [3].

It is trite that sanctity of contract [4] is one principle that comes into play here. In cases that concern restraints of trade it has a general and particular meaning. In a general sense courts accept that the protection of faith in contracts is an important societal value. They acknowledge that it is morally important and in the interest of economic organisation that individuals should be able to rely on contracts. In particular courts accept that, in these cases, specific interests will underlie the enforcement of contracts [5].

However, it is difficult to discern the counter-principle. Some courts have relied on overly vague tenets such as public policy in general. But more flesh will have to be added. Others have argued that the restraint of trade doctrine is also based on freedom of contract [6]. Restrictions often limit the ability of the covenantor to enter into further contracts. However, there is a more profound clash of principles that underlies the doctrine.

The most important objective here will be to investigate all the different possibilities and to determine precisely what the counter-principles are. Many restraint of trade aspects can only be understood and developed if the principles underlying the doctrine are described with precision.

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1. Herbert Morris 717 they have been obscured at times; Du Plessis & Davis 95 for some reasons.
2. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C), See supra Ch 2.3.2.
3. E.g. Esso 304.
4. Already visible in Mitchel v Reynolds (1711) 1 PWms 181 at 186 where the court mentioned volenti non fit injuria; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453; Esso 323.
5. Homer v Ashford and Ainsworth (1825) 3 Bing 322 at 327 is too wide; Nordenfelt 552 fair dealing between man and man, 555 rules of common honesty. These are underlying reasons for maintaining sanctity of contract; Woolman 257 where the right to protect interests was stressed but this is a manifestation of sanctity of contract.
6. Russell v Amalgamated Society of Carpenters & Joiners [1910] 1 KB 506 at 516, 518; Rautenbach & Reinecke 555, 556 especially 561; Collinge 410; See the criticism of Lubbe 239 of Joubert.

Many of the problems in the area of restraint of trade exist because courts do not clearly delineate the principles underlying the doctrine.

3. The restraint of trade doctrine and restrictions of liberty in general

The liberty of the subject in general has historically been emphasised in restraint of trade cases in Scots law [7], and has also been stressed in the other systems [8]. This is correct but simplistic statements like these must be qualified. The doctrine is only concerned with specific aspects of the liberty of the individual [9] (although other forms of interference with liberty may also be contrary to public policy). Lord Watson correctly distinguished the different aspects in *Nordenfelt* [10]. He contended that the law would be opposed to all infractions upon the liberty of the individual that interfere with the interests of the state or the community. The judge then noted that a contract by which an individual binds himself not to use his time and talents in pursuit of a trade or profession will also be ineffective if attended with these consequences, i.e. if it interferes with the interests of the community.

The principle is the same in Scotland. In *Stewart* [11] the pursuer noted that restraint of trade law has been treated as part of the law in favour of individual liberty [12] and that English law had developed from different roots. He concluded [13] that Scots law should be different from English law although the practical result should often be similar. But personal liberty has not gained any specific and separate meaning in Scots law. The court in *Stewart* did not even address this point,

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7. Stalker v Carmichael 1735 M 9455, See the case is placed under this heading in Morison's Dictionary, Quoted in Watson v Neuffert (1863) 1 M 1110 at 1113; Bell Prin (10th ed) 40 and Comm 7th ed 322; More in his notes to Stair (1832) lxiv; Gibson *Encyclopaedia* 511; See Woolman 253.

8. Mitchel v Reynolds (1711) 1 PWms 181 at 188 with reference to the Magna Carta although the court accepted that this does not apply in voluntary restraint cases; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 309-310; Hilton v Eckersley (1855) 6 El & BL 47 65; Nordenfelt 565 where the two aspects were separated; Russell v Amalgamated Society of Carpenters & Joiners [1910] 1 KB 506 at 526; Russell v Amalgamated Society of Carpenters & Joiners [1912] AC 421 at 430, 435 mentioned by Fridman 859, See further criticism infra 6.2; Mason 737, 742; Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] 2 QB 514 at 565; The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686; Atiyah 337; Willet v Blake (1848) 3 Menz 343; KWV van ZA Bpk v Botha 1923 CPD 429 at 437.

9. Mitchel v Reynolds (1711) 1 PWms 181 at 189; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 827 although considerable emphasis was placed on liberty; Harrop v Thompson [1975] 1 WLR 545 at 548-549; Cronin & Grime 51 but their further arguments can be criticised; See Stewart v Stewart (1899) 1 F 1158 at 1170 and the careful language 1166-1167, 1164, See Christie *Jur Rev* 294; See also Macrae & Dick Ltd v Philip 1982 SLT ShCt 5 at 7; Christie *Encyclopaedia* 580-581.

10. Nordenfelt 552 quoted in E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 311.

11. Stewart v Stewart (1899) 1 F 1158 at 1161-1162, See supra Ch 2.4.2.1 and infra Ch 9.5.

12. With reference to Bell and More's Stair supra.

13. With reference to Watson v Neuffert (1863) 1 M 1110 and Curtis v Sandison (1831) 10 S 72.

and Scots courts since have closely followed English law. The principles underlying the doctrine and the rules built upon these principles will be very similar in the two systems.

Yet the opposite error must not be made. The range of the principles underlying the doctrine should not be so narrowed down that issues which should fall within the doctrine become excluded from its operation. In *Strathclyde Regional Council* [14] training of N, an employee, was paid for by the employer S. An agreement stipulated that the employee would continue in the employment of S for two years or alternatively would pay back certain sums. The court classed the question of the legality of such a limitation as falling outside restraint of trade law. That is unacceptable and several of the problems in the case can be traced back to this fundamental error [15].

4. The doctrine and unconscionability

In the broadest sense it has been suggested that the doctrine should be aimed at protecting fairness in contracts [16]. In *A Schroeder* [17] Lord Diplock correctly accepted that broad economic theories have played no more than a formal role in the field of restraints of trade. He then averred that the issue here is unconscionability. However, this is acceptable only as long as the doctrine is not thereby used for resolving general issues of unconscionability.

- Unconscionability interacting with public interest in a very particular way lies at the heart of the doctrine [18]. The restraint of trade doctrine is not the panacea for problems of fairness in contractual relations [19].
- The restraint of trade doctrine may sometimes go completely beyond even these very particular types of unconscionability [20].

In *George Michael* [21] Parker J in a carefully reasoned judgment distinguished the doctrine from broad unfairness as a ground of public policy ineffectiveness. He accepted that the two issues

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[14]. Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90-91.
[15]. Horwood v Millar's Timber and Trading Co Ltd [1917] 1 KB 305 can be criticised on similar grounds.
[16]. Atiyah 337; Schoombee 130 with reference to J Bell *Policy Arguments in Judicial Decisions* (1983) 160; Wedderburn 149 although he contextualised it somewhat.
[17]. A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 623, See Anson 319, Nelson 44; Clifford Davis Management Ltd v WEA Records Ltd [1975] 1 All ER 237 at 240.
[18]. See Herbert Morris 698, See Christie *Encyclopaedia* 593-594; Palmolive Co (of England) Ltd v Freedman [1928] 1 Ch 264 272 although it was incorrect to limit the issue to employment in the narrow sense; Cf Esso 323 it is not clear how the court understood oppression here; Collinge 406, 410; Gurry 206; McCullough & Whitehead v Whitaeway & Co 1914 AD 599 at 625, See infra Ch 5.
[19]. Dawson 458-459 cannot be accepted.
[20]. Infra Ch 9.
[21]. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 316-319.

might overlap but, he still stressed that they have separate requirements. However, the judge then attempted to redeem *A Schroeder*. He contended [22] that the point about fairness made by Lord Diplock in *A Schroeder* [23] was aimed at this first public policy ground and not at the restraint of trade doctrine. Parker J noted that Lord Reid in *A Schroeder* confirmed the principles expressed in the fundamentally important *Esso* case. He stated that the point in the judgment of Lord Diplock would have conflicted with that of Lord Reid if it was regarded as an expression of the doctrine. But he concluded that the court did not view it thus. Lord Simon of Glaisdale in *A Schroeder* agreed with the speeches of Lord Diplock as well as that of Lord Reid.

Yet this is unacceptable. Parker J did not pay heed to the context of Lord Diplock's comment. The gist of the speech indicates that he aimed his remarks at the doctrine. It opens with the words, "Because this can be classified as a restraint of trade the restrictions that the respondent accepted fell within one of those limited categories of contractual promises in respect of which the courts still retain the power to relieve the promisor of his legal duty to fulfil them". It then goes on to discuss the circumstances in which courts have exercised the above mentioned powers. Lord Diplock in *A Schroeder* [24], even in the passages quoted by Parker J, made it manifest that he was dealing with the restraint of trade doctrine.

5. Promotion of economic progress

The view has sometimes been taken that the doctrine is concerned with economic progress. If so understood, the doctrine aims at increasing buying and selling or wider economic activity [25]. However, this is an unacceptable basis for the restraint of trade doctrine. The doctrine is concerned with more specific principles.

In *Petrofina* [26] Diplock LJ stated that the public interests which the court tries to promote in terms of the restraint of trade doctrine are social and economic, i.e. liberty and prosperity. He accepted that the principle of liberty here connotes "liberty of the individual to trade with whom he pleases in such manner as he thinks desirable". He then acknowledged that prosperity concerns the "prosperity of the nation by expansion of trade". This seems unacceptable but the judge later qualified his statement. He came to the conclusion that "their reflection in the courts takes the

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22. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 318ff.
23. A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 supra.
24. A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 623.
25. Proctor v Sargent (1840) 2 Man & G 20 at 37; Although not clear Rannie v Irvine (1844) 7 Man & G 969 at 977; Connors v Connors [1940] All ER 179 at 191; Nordenfelt 566; Edgcombe v Hodgson (1902) 19 SC 224 at 226; Federal Insurance Corp of SA Ltd v Van Almelo (1908) 25 SC 940 at 944; See infra Ch 10.5.1.
26. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 138, See also 139, See Gurry 206.

form of a change of approach to the question of what is reasonable in the interests of the parties". It is not clear exactly how the court sees the interaction between the principles, but it is submitted that prosperity can be no more than a background principle [27].

6. The principle of freedom of trade

It has been established that the doctrine concerns a more narrow concept than liberty in general or unconscionability [28]. Yet what will this concept be? Freedom of trade is often mentioned as the basis of the doctrine and this is certainly acceptable [29]. But it is difficult to determine what freedom of trade means.

6.1. Restraints of trade and buying and selling

Freedom of trade can be interpreted as the protection of freedom of buying and selling or the conclusion of a transaction of buying and selling. Here the use of the word "trade" can be likened to its use in common parlance.

It will, however, be wrong to suppose that the doctrine protects the ability to conclude particular transactions. Such restrictions may in certain cases be in restraint of trade but restrictions on a transaction, per se, will not offend freedom of trade.

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[27]. Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 826-828.

[28]. Contra Du Plessis and Davis 95-96, But see Schoombee 128.

[29]. Ward v Byrne (1839) 5 M & W 548 at 561; Hilton v Eckersley (1855) 6 El & BL 47 at 55-56, 59 "free will ... in their management"; Nordenfelt 566, 567-568, 565, See the impact of this dictum on the scope issue Esso 294-295, 308; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 312; United Shoe Machinery Co of Canada v Brunet [1909] AC 330 at 342-343; Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 795, Quoted in McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 572, Bathurst Farmers' Union v Bradfield 1923 EDL 391 at 397, Halliwell v Laverack 1929 WLD 175 at 177-178; Herbert Morris 699, 715-716; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 581, See the reference KWV van ZA Bpk v Botha 1923 CPD 429 at 435; Faramus v Film Artistes' Association [1963] 2 QB 527 at 558; Esso 317 and the discussion of Magna Carta; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 573; Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 614-615; Chitty 1199; Collinge 410, 420, 423; Watson v Neuffert (1863) 1 M 1110 at 1112; Kilgour v McNicol 1961 SLT ShCt 8 at 9; Campbell 281; McBryde 590; Woolman 253; Park Gebou-Beleggings en Wynkelders Bpk v Rogers and Hart (Pty) Ltd 1954 (3) SA 109 (T) 116 "vryheid om handel te dryf" although it is not clear if this should be translated with freedom of trade or freedom to trade, See the most acceptable Afrikaans definition in Magna Alloys infra 7; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 614; SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 505; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 505; Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 192; Book v Davidson 1989 (1) SA 638 (ZS) 647 and see the discussion of Pest Control supra; Basson v Chilwan 1993 (3) SA 742 (A) 776, Quoted in Gero v Linder 1995 (2) SA 132 (O) 135; De Wet & Yeats 81; Schoombee 129; Kerr 503; Lubbe (1990) 13 "handelsvryheid" probably also should be so translated; Van der Merwe 156.

- It was argued in *Shearson* [30] that a rule of the London Metal Exchange that interfered with a specific set of transactions, in the narrow sense of the word, was in restraint of trade [31]. However, the court correctly rejected this notion [32].
- The court in *BMTA* [33] had to determine whether a restriction in a sale of goods could be regarded as being in restraint of trade. The First Division unanimously rejected the contention that a contract in terms whereof the buyer of a motorcar was not allowed to resell that car for a certain period restrained the trade of a one-off buyer of a motor car. To this extent the court is clearly correct. The restraint of trade doctrine is concerned with broader trends and wider issues of principle (although the court did not take a completely acceptable view of the principles that underlie the doctrine [34]).

The view can be taken that the doctrine is aimed at protecting the free capacity of individuals to buy and sell [35]. A passage from the judgment of Kekewich J in *Davies* illustrates this [36]:

> "There are frequent statements in the books, that in thus favouring trade the law desires to assist every man to earn his living by that trade for which he was apt; and possibly some judges thought that this was required by public policy, but to my mind what is really meant by the law favouring trade is, that it was considered a matter of essential importance to encourage all men to trade so the public might gain advantage by their trading - in other words it was considered public policy to assist England to become a nation of traders."

The courts have also talked of restraints on "trading" [37], and they have sometimes placed the emphasis on "traders" [38] and the verb "to trade" [39]. This may also limit the meaning of trade to buying and selling.

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30. Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570.
31. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 131 also stressed "arrangements", See Shearson quoted the passage from Lord Denning but it omitted this part.
32. Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 614-615; Treitel 423.
33. British Motor Trade Association v Gray 1951 SC 586 at 598, 602 although the issue was not properly discussed, See also BMTA v Gilbert [1951] 2 All ER 641, Macrae & Dick Ltd v Philip 1982 SLT ShCt 5 at 7.
34. Infra 6.2.
35. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 134, 141; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 568, 568-569, See also 581-582; The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 706, 707, Chitty 1234, See Koh 73; Instone v A Schroeder Music Publishing Co Ltd [1974] 1 All ER 171 at 172; Cf also United Shoe Machinery Co of Canada v Brunet [1909] AC 330 at 343 "liberty to hire or not to hire the appellant's machine" and "privilege ... to dispose of the products they manufacture".
36. Davies v Davies (1887) 36 ChD 359 at 365.
37. Hilton v Eckersley (1855) 6 El & Bl 47 55-56; Nordenfelt 565; Herbert Morris 701; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 33; The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 698; Cheshire Fifoot and Furmston 398.
38. United Shoe Machinery Co of Canada v Brunet [1909] AC 330 at 342-343; Collinge 410.

However, this view is confusing. It has been expressly and convincingly rejected in *Hepworth*. Atkin LJ [40] stated that "It is a misapprehension to suggest that this doctrine is confined merely to restraint of trade in any ordinary meaning of the word 'trade'; it extends further than trade, it undoubtedly extends to the exercise of a man's profession or calling...". The judge, after quoting authorities, submitted "that the doctrine was not confined to restraining commercial transactions as such".

The doctrine is not primarily rooted in protecting the freedom of buying and selling of goods. Most courts have at least accepted that other aspects will also be relevant [41]. But the protection of sellers or buyers should only come into play via the principles underlying the doctrine [42], that is, if buying and selling is the work of the covenantor.

Collinge [43] averred that the courts will be lenient in regulating the movement of commodities while they will be strict when it comes to restrictions on the freedom of employees. However, one can go even further. The doctrine is not directly concerned with the former.

6.2. Restraint of trade and monopolies

Trade is sometimes also used as a synonym for the operation of markets. Thus courts have, on occasion, opined that the doctrine is market-related, anti-monopolistic [44], and aimed at the promotion of competition [45] or free trade at large [46].

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[39]. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 138, Adopted in Esso 317 but see the warnings 307; Esso 306, See the reference Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 73; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 826, 827, 829, See Texaco infra; Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd [1983] 1 WLR 87 at 104; Collinge 423; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 152; Katz v Efthimiou 1948 (4) SA 603 (O) 612; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 504, See Aronstam 23; Nathan 37; Van der Merwe 140; Woker 331.

[40]. Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 26-27, Heydon *McGill* 326; See also Atiyah 343; Cf Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 828 the court omitted the part about the trading in goods in its quote from Dickson.

[41]. McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 572, See the criticism Esso 296 of McEllistrim; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 573.

[42]. Many of the authorities supra can be so interpreted see especially Kerr 503.

[43]. Collinge 422.

[44]. Davies v Davies (1887) 36 ChD 359 at 398; Swaine v Wilson (1889) 24 QBD 252 at 257; Wedderburn 149.

[45]. Dottridge Bros (Ltd) v Crook (1907) 23 TLR 644 at 645; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1423; Spencer v Marchington [1988] IRLR 392 at 396; Anson 319; Collinge 410; Korah *JBL* 251, 253; Blake 627; Guest 7, 9-10; Notes (1929) 29 *Columbia Law Review* 347; Kales 195; Sales 606-607, 607-608, 615; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 152-153, 157; Whish *Stair Encyclopaedia* 1212, 1213, 1215ff.

[46]. Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 322 at 326-327; Russell v Amalgamated Society of Carpenters & Joiners [1912] AC 421 at 435; Herbert Morris 699 although it is not clear how the court used this

However, this must be approached with caution. It is incorrect to see the restraint of trade doctrine as being primarily an anti-monopoly tool.

- There are no authorities that expressly reject this notion as a basis for the doctrine, but some hint at it [47].
- It will become apparent from the ensuing discussion that the jurisdictional and substantive aspects of the doctrine have not really concentrated on anti-monopoly issues.
- Most authorities mention principles that accord more precisely with the jurisdictional and substantive character of the restraint of trade doctrine as it has developed.

The philosophical and economic background against which the restraint of trade doctrine will operate is rooted in the notion that a free and competitive economy is the best machine for the development and maintenance of prosperity [48]. But the doctrine is ill suited to developing such a notion, and only confusion is caused by placing it at the core of the doctrine.

The most that can be said is that the promotion of free markets will probably still, to some extent, be a secondary aim of the doctrine. The duality of the principle underlying the doctrine is already evident in *Mitchel* [49]. Lord Macclesfield in his discussion of voluntary restraints first enumerated what he called "The true reasons of the distinction on which the judgment in these cases of voluntary restraints are founded [50]". He then continued:

> "A second reason is the great abuses these voluntary restraints are liable to, as for instance, from corporations who are perpetually labouring for exclusive advantages in trade and to reduce it into as few hands as possible [51]."

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phrase here; Empire Meat Co Ltd v Patrick [1939] 2 All ER 85 at 91; Connors v Connors [1940] All ER 179 at 191; Monkland v Jack Barclay Ltd [1951] 2 KB 252 at 265; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 317; Korah *JBL* 252, See the criticism infra; See the emphasis in Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 152, Quoted Steiner v Breslin 1979 SLT (Notes) 34-35; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 311, See Otto 209, See the criticism supra; A Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A) 417 quoted in Magna Alloys 889.

47. Collins v Locke (1879) 4 App Cas 674 at 685; United Shoe Machinery Co of Canada v Brunet [1909] AC 330 at 331, 341 although it is not clear, 342-343 where the monopoly and restraint of trade issues were more properly related; Esso 327; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 827-828, See infra Ch 10.5.1; Chitty 1190 might be so read.

48. This also seems to be the meaning of the comparison between monopolies and restraints in the discussion of Lord Morris in Esso 304; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 76, See however the interpretation of Schoombee 129; See Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 500.

49. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 135; The duality already played some role in Ipswich Tailor's Case (1613) 11 Co Rep 53a.

50. See infra.

51. Mitchel v Reynolds (1711) 1 PWms 181 at 190, See also 187; See also supra.

This duality became crystallised in later cases [52], and it has been confirmed again recently by Simon Brown LJ in *JA Mont* [53]. He regarded the protection against monopolies as a further basis for the restraint of trade doctrine although correctly he did not view it as the only ground.

However, it should be asked whether even this duality ought not to be abandoned. It is now no more than a legal anachronism. Market issues should only play a role as the determinant of the legal backdrop against which fundamental principles should be protected [54]. These issues were elevated to an important status in the 19th century in terms of then current notions of political economy, but it has lost some of its power here.

Freedom of markets and the core values that underlie the principle of freedom of trade must be clearly distinguished even if the former is still part of the doctrine. A properly understood principle of freedom of trade and the interest in a free market may in certain circumstances clash [55]. Such clashes can be more comfortably dealt with by utilising other techniques [56].

Korah [57] criticised the common law doctrine on the basis that it did not properly take note of the competitive position. But the main purpose of the doctrine lies on a different level. The significance of competitive position is much reduced because other values are at the core of the doctrine. Korah's criticism is therefore not a serious indictment of the doctrine, although it shows that competition issues will still have to be dealt with in some other way.

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52. Wickens v Evans (1829) 3 Y & J 318 at 329 and 330; Hilton v Eckersley (1855) 6 El & Bl 47 at 55; Nordenfelt in the Court of Appeal quoted 561, Nordenfelt 566; Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 795-796; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 469-473, 479 although Viscount Haldane LC 471 emphasised it in commercial contracts; Rawlings v General Trading Co [1921] 1 KB 635 at 644; English Hop Growers Ltd v Dering [1928] 2 KB 174 at 187; Esso 340-341; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 574; Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 614; Christie *Jur Rev* 286; Atiyah 337; Chitty 1199; Cheshire Fifoot and Furmston 415; Kales 195; To some extent recognised Korah *JBL* 253 although it is not clear see infra; Christie *Encyclopaedia* 582; Woolman 253; Whish *Stair Encyclopaedia* 1213, 1217; Schoombee 129.

53. JA Mont (UK) Ltd v Mills [1993] FSR 577 at 587.

54. This is apparently how it was seen in Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T); See especially the discussion infra Ch 6.16.

55. See Alberts 288ff and the discussion of the right to be economically active in the context of competition legislation.

56. See infra Ch 10.5.1; But see Chitty 1199, Heydon *McGill* 352, 354, 357.

57. Korah *JBL* 254.

7. Correct approach: the emphasis on work

The most important element of the principle of freedom of trade is *work*. In this sense it is an extension of the noun "trade" as used in the sentence "A carpenter practises a trade". It denotes the use of acquired skills by an individual to earn a living. It will avoid much potential confusion if courts more accurately and consistently talk of "freedom of work" [58], although the use of the phrase "freedom of trade" has a long history and it is probably too late to argue for such change in usage.

Freedom of work has several meanings. Its composite nature often makes it difficult to discern the principle underlying the doctrine. The different dimensions of freedom of work and the different concepts which freedom of work embraces will have to be distinguished.

8. Protection of the ability to work

The doctrine concerns the protection of the ability to work or the right to use work skills [59]. Work skill is one of the most important assets of an individual and of the society to which he belongs.

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[58]. E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 304; Russell v Amalgamated Society of Carpenters & Joiners [1912] AC 421 at 434, 435; Mason 732; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 33; Gozney v Bristol Trade & Provident Society [1909] 1 KB 901 at 909; Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181 at 189; M & S Drapers v Reynolds [1956] 3 All ER 814 at 819; Mason 737; Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 614-615; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 427; Treitel 423; Collinge 410; Davies 490; Graupner 879; Stewart v Stewart (1899) 1 F 1158 at 1164, 1166-1167, 1164; Walker 183; Woolman 253 in his discussion of the position in English law in early times; Magna Alloys 894, 898 contains the most acceptable Afrikaans formulation "handels en beroepsvryheid"; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 501, 505; Basson v Chilwan 1993 (3) SA 742 (A) 762, 767, Rautenbach & Reinecke 555 took a too narrow view; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 442; Van der Merwe 140, 155; Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 785; Schoombee 129; Woker 332.

[59]. Mitchel v Reynolds (1711) 1 PWms 181 at 187; Homer v Ashford and Ainsworth (1825) 3 Bing 322 at 326, See the references Mallan v May (1843) 11 M & W 653 at 666 and Attwood v Lamont [1920] 3 KB 571 at 583; Farrer v Close (1869) LR 4 QB 602 at 612 and the discussion of the memorandum of Sir William Erle, Quoted Russell v Amalgamated Society of Carpenters and Joiners [1910] 1 KB 506 at 527; Collins v Locke (1879) 4 App Cas 674 at 685; Leather Cloth Company v Lorsont (1869) LR 9 Eq 345 at 354, Quoted: Herbert Morris 701, McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 571, Attwood v Lamont [1920] 3 KB 571 at 584, Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 810, Esso 296, Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 546-547 in turn quoting McEllistrim, Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 614, Cheshire Fifoot and Furmston 401, Holmes v Goodall and Williams Ltd 1936 CPD 35 at 41, Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 347 also with reference to Cheshire and Fifoot; Mineral Water Bottle Exchange & Trade Protection Society v Booth (1887) 36 ChD 465 at 472; Nordenfelt 552; Bromley v Smith [1909] 2 KB 235 at 240; Mason 738, 739, 741; Herbert Morris 698-699, See Christie *Encyclopaedia* 593-594, Herbert Morris 706, 714; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 9, 12, 26-27, 27-28, See the reference to Hepworth in South Africa: Aling and Streak v Olivier 1949 (1) SA 215 (T) 222, Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 347, Filmer v Van Straaten 1965 (2) SA 575 (W) 579; Whitehill v Bradford [1952] 1 Ch 236 at 246; Petrofina (GB) Ltd v Martin

Protection of that interest will be central to any legal system that has the interests of members of society and society itself at heart. The phrases "freedom of work" or "freedom of trade" can be used to denote this more specific aspect. "Freedom" is then used in the same sense as "right".

The restraint of trade doctrine, accordingly, is the contract law version of a principle that seems to be developing in England and South Africa.

- The courts in England have in certain cases maintained that there is a general right to work principle [60] although its content has not been clarified yet. *Goring* [61] accepted that the principle does not apply in the domain of the restraint of trade doctrine, that is, where a contract already exists between the parties. The court is probably correct but it is submitted that right to work notions (in such cases) will be promoted by the restraint of trade doctrine.
- It has been recognised in the law of delict in South Africa that a right to earn a living should be protected. The exact theoretical position and content of this principle have not been worked out [62], but courts have been prepared to protect the ability to work [63], and this principle has now been recognised in the Interim Constitution [64].

[1966] 1 All ER 126 at 131 quoted in Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 614; Esso 304, 328; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 400; Nagle v Feilden [1966] 2 WLR 1027 at 1041; Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 439; Greig v Insole [1978] 3 All ER 449 at 496 and the interpretation of Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413; Cf however Cheshire Fifoot and Furmston 406 where the author said that the covenantee can rely on a right to work to justify the restraint. This is the wrong way round although the right to work may play a role in the development of protectable interests see infra Ch 6.16; Sales 601; See Trebilcock 1ff; Winfield 320, 324; BMTA v Gray 1951 SC 586 at 598, See the reference in Macrae & Dick Ltd v Philip 1982 SLT ShCt 5 at 7; Christie *Encyclopaedia* 582; Woolman 257; Tilney v Rock and Way 1928 EDL 108 at 110; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 171; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198 although it is unacceptable to see this as a basis for distinguishing different types of restraints see infra Ch 9.2; Bonnet v Schofield 1989 (2) SA 156 (D) 158; Book v Davidson 1989 (1) SA 638 (ZS) 640 with reference to Magna Alloys 898 but see the word "vryelik" or "freely" is left out in the translation in Book; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 794; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 571; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC).

60. Nagle v Feilden [1966] 2 WLR 1027 at 1032-1035, 1037-1039 and see the authorities mentioned there, 1040-1043; Enderby Town Football Club Ltd v The Football Association Ltd [1971] 1 All ER 215 at 219; Edwards v SOGAT [1971] 1 Ch 354 at 376-377; McInnes v Onslow-Fane [1978] 1 WLR 1520 at 1528; Greig v Insole [1978] 3 All ER 449 at 509ff; Goring v British Actors Equity Association [1987] IRLR 122 at 127.

61. Goring v British Actors Equity Association [1987] IRLR 122 at 128; See also: Enderby Town Football Club Ltd v The Football Association Ltd [1971] 1 All ER 215 at 219, Edwards v SOGAT [1971] 1 Ch 354 at 376-377, Greig v Insole [1978] 3 All ER 449 at 509ff.

62. Neethling (1990) 101; See Alberts 288ff.

63. See Hawker v Life Office Association of South Africa 1987 (3) SA 777 (C).

64. See infra 12.

However the notion "right to work" might imply a positive right to be able to work, but the principle underlying the doctrine is more negative. It concerns the protection of individuals against unnecessary interference with work skills or the ability to work: a right to *use* work skills [65].

8.1. Economic efficiency and the doctrine

Trebilcock argues that the right to work concerns an equity and an economic efficiency element. The two elements correspond quite closely with subjective and objective elements [66]. But the objective element especially is more narrowly economic. He then attempts to develop the doctrine in terms of economic efficiency. He analyses the entire doctrine in terms of Pareto efficiency and the wider question whether the contract harms third parties economically. He accordingly gives a refined theory that combines the notion that economic progress underlies the doctrine with freedom of work.

However, his basic point of departure does not seem wholly acceptable. Restraint of trade lawyers have much to learn from his analysis, but it seems that the efficiency notion cannot form the only basis of the doctrine. The original rationale is a *legal* principle. Freedom of work is seen as a fundamental societal value that is partially separate from economic efficiency. Trebilcock [67] addresses some elements of this argument:

> "A second reaction is that most of the claimed deficiencies of the common law process, viewed in an efficiency framework, are indeed inherent features of it and that rather than viewing them as deficiencies they should be construed as suggesting that the common law in this area is not and should not be primarily concerned with efficiency objectives."

He looks at the question whether the doctrine should then concern commutative fairness and he then relates these notions to efficiency [68]. He is probably correct in noting that such a commutative justice principle could also be explained in terms of a sophisticated efficiency theory. But the primary aim of the doctrine is not commutative justice [69].

He then addresses the more radical critique that the market reference cannot apply in the labour context [70], but contends that this has not been the ethical logic underlying the doctrine. If it was, he states, employment would be removed from the contract law sphere completely and all or most

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65. Cf McInnes v Onslow-Fane [1978] 1 WLR 1520 at 1528-1529; See Kidner 99.
66. Infra.
67. Trebilcock 407ff.
68. With reference to James Gordley "Equality of Exchange" (1981) 69 *California Law Review* 1587.
69. Supra 4.
70. David M Beatty "Labour is not a Commodity" in Reiter and Swan (eds) *Studies in Contract Law* (1980).

restraints would then be illegal. But this either-or argument is too absolute. The law accepts that work or labour is affected by the market. It acknowledges that work cannot be regarded simply as a commodity and it therefore balances the effect of the market against ethical principles that have developed independently from market-related notions.

It has been accepted that work cannot be completely separated from the market. Some restraints have therefore been regarded as enforceable. This can be explained as an efficiency principle and Trebilcock explains the grounds for enforcing a restraint on this basis. But the notion has not been absolute. The jump from this to the more absolute contention that the entire doctrine should be rooted in efficiency is not justified by the author. The courts rather seem to balance efficiency and freedom of work on an ethical level. The fundamental point of departure in this thesis is that through the doctrine the law attempts to promote ethical principles in the market place.

Moreover, the efficiency argument can be further relativised. Ultimately the approach here turns on a different view of law and legal argument. Trebilcock is fundamentally enthused by economic arguments in law. A more traditional view of law will be taken here. Law deals fundamentally with ethical and justice arguments. Economic analysis gives an interesting perspective on law but the arguments which lawyers find convincing operate on a different level. This does not mean that law must be inherently static, as Trebilcock seems to suggest. But law and with that the restraint of trade doctrine develops through other channels.

9. The underlying notions

Many aspects underlying the ability to work have been thrown up by the cases. These different aspects play an important role in shaping and developing the restraint of trade doctrine and they will accordingly be separately discussed. They will be divided into those that can be described as subjective, and those that can be called objective. All the different issues are, however, interwoven; they interact continuously. Some of these interactions will be discussed but a full survey would be too complex.

9.1. Subjective aspects

Freedom of trade concerns the interests of the public through the interests of the individual. These issues still fall under the public policy rubric, but they will be called the subjective aspects because they do so via the interests of an individual [71].

9.1.1. The right or ability to earn a living

One of the functions, if not the most important purpose, of work skills is to provide an individual with a living. The courts have often mentioned that the interest to be protected is the right or ability to earn a livelihood through acquired skills [72]. This aspect, although at the core of the freedom of work principle, is just one element underlying the doctrine. It does not equate with freedom of work. A clause may still interfere with freedom of work in many cases where the covenantor can still earn a living.

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[71]. For examples of expressions of both aspects: Leather Cloth Company v Lorsont (1869) LR 9 Eq 345 at 345, BMTA v Gray 1951 SC 586 at 598, See also supra 6.1, 8; It is unclear whether this is properly appreciated by Sales 601.

[72]. Dyer's Case (1414) YB 2 Hen 5 fo 5; Mitchel v Reynolds (1711) 1 PWms 181 at 190, See 192 it will not have to be shown on a particular set of facts; Young v Timmins (1831) 1 Cr & J 331 at 340; Horner v Graves (1831) 7 Bing 735 at 744; Ward v Byrne (1839) 5 M & W 548 at 560; Newling v Dobell (1868) 38 LJCh 111 at 112; Davies v Davies (1887) 36 ChD 359 at 386; Nordenfelt 561 quoting Lindley LJ a quo, Nordenfelt 569 in similar terms as Ward v Byrne; Davies Turner & Co v Lowen (1891) 64 LT 655 at 656 although discussed in granting of interdict; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 309-310, 312; Counsel in Phillips v Stevens (1899) 15 TLR 325, See the criticism infra 9.2.1; Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 189 at 194; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 767, 771; Dottridge Bros (Ltd) v Crook (1907) 23 TLR 644; Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 795 quoted in McEllistrim, Bathurst and Halliwell supra 6; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 471; Mason 732, 737, 740, 746; Herbert Morris 699, See Christie *Encyclopaedia* 594, See also Herbert Morris 714; Attwood v Lamont [1920] 3 KB 571 at 577, See the reference Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 277; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12, 24; Faramus v Film Artistes' Association [1963] 2 QB 527 at 558, Faramus v Film Artistes' Association [1964] AC 925 at 942; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1376 although the arguments are here limited to employment contracts; Esso 304; A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 621, Nelson 45; Office Overload Ltd v Gunn [1977] FSR 39 at 43; Greig v Insole [1978] 3 All ER 449 at 495, 502-503, 503-504; JA Mont (UK) Ltd v Mills [1993] FSR 577 at 585, 587; See counsel in R v Jockey Club ex parte RAM Racecourses Ltd [1993] 2 All ER 225 at 243. The court apparently accepted this view; Watson v Prager [1991] 1 WLR 726 at 747; Chitty 1203, 1206; Heydon *McGill* 355 when determining whether a delictual claim will lie for interference by restraint; Kales 195; Selwyn 385; Stewart v Stewart (1899) 1 F 1158 at 1169; Pratt v Maclean 1927 SN 161 and the emphasis of counsel; Woolman 253, 256; Aling and Streak v Olivier 1949 (1) SA 215 (T) 221; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 439; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 504; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 201; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313 although she placed too much emphasis on it; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 500; Nathan 37; Cf also Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 13 although the doctrine was not directly in issue here, See Van der Merwe and Lubbe 97.

9.1.2. The right to use work skills and fulfilment of an individual

The status and function of an individual are often determined by the work that he performs in society. Interference with the ability to work should therefore be taken seriously. This important dimension of the right to use work skills has not really been distinguished in the cases. However, the social importance of work was already emphasised in *Ipswich Tailors* [73] where it was stated that "no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, *otium omnium vitiorum mater*".

9.1.3. Acquiring further skills

A person will gain skills and experience by being employed. The court will accordingly be sceptical of interference with the ability to work as it inhibits the ability of the covenantor to improve his work skills and abilities [74].

9.2. Objective factors

Aspects that relate more directly to the interests of the public can be distinguished. These issues will be labelled objective freedom of trade elements.

9.2.1. Entitlement of society to the skills of an individual

The courts have emphasised society's entitlement to the fruits of the work of persons who have the necessary skills [75]. In *Herbert Morris* [76], even the entitlement of employers to use employees was

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[73]. Ipswich Tailors case 11 Co Rep 53a; See also Woker 332.

[74]. Ipswich Tailors case 11 Co Rep 53a; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 157; See infra Ch 6.14.

[75]. Ipswich Tailors Case 11 Co Rep 53a; Mitchel v Reynolds (1711) 1 PWms 181 190; Young v Timmins (1831) 1 Cr & J 331 at 340; Horner v Graves (1831) 7 Bing 735 at 745; This appears to have been one of the most important reasons why a distinction was previously drawn between partial and general restraints see: Ward v Byrne (1839) 5 M & W 548 at 562, Davies v Davies (1887) 36 ChD 359 at 386; Nicholls v Stretton (1843) 7 Beav 42 at 44-45; Leather Cloth Company v Lorsont (1869) LR 9 Eq 345 at 354, See the cases that quoted Lorsont mentioned supra 8; Phillips v Stevens (1899) 15 TLR 325 at 325 although it was incorrect to emphasise this to the exclusion of the right to earn a living; Dottridge Bros (Ltd) v Crook (1907) 23 TLR 644; Herbert Morris 706, 714; Attwood v Lamont [1920] 3 KB 571 at 577, See the reference Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 277, Cf also Bull 282 discussed infra; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12, 24; Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 798, 807, 810; Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181 at 189; Nagle v Feilden [1966] 2 WLR 1027 at 1041; This point appears to have played an important role in the arguments of the court in Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 574; The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 690 where this issue is touched upon; A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 621, Kales 195, Nelson 45; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 282, 283-284; Systems Reliability Holdings plc v Smith [1990]

mentioned. In *Basson*, the latest Appeal Court case in South Africa, Nienaber JA [77] again stated that sanctity of contract and the discouragement of unproductivity have to be balanced in terms of the public interest requirement . The interest of society in the input of productive individuals is an important aspect underlying the doctrine, although the court probably overstated its importance.

In *Stewart* [78] Lord Young accepted that a restraint could still be ineffective even if the public only had a marginal direct interest in it. A contract will not only be in restraint of trade where it can actually be shown that the interests of the public will be interfered with. This issue will play an abstract role. It will not have to be shown that a particular contract will de facto undermine the direct interest of the public. The courts will theoretically accept that the public will be deprived of the services of men if restraints are not curtailed, and that will be sufficient. The main importance of this aspect will be as a principle rather than a concrete reality in any particular case. This relation, within the doctrine, between the ability to work and the interest which society will have in output of work will impact on the manner in which the last mentioned issue is considered.

Hence, the narrower view expressed by Du Plessis and Davis [79] must be rejected. They criticise the conclusion that freedom of trade entails the freedom of the individual to work. They deny that the doctrine is at all concerned with the interests of the individual covenantor. For them the basis of intervention is much more fundamental. They submit that the doctrine is solely aimed at ensuring that society is not deprived of the services of an individual without receiving a concomitant advantage. But the two arguments in support of their thesis cannot be accepted:

- They argue that courts have accepted that a contract may not even fall within the doctrine although it interferes with an individual's ability to work. Yet this will only be so when the court comes to the conclusion that the ability to work is not on the whole interfered with, or if it is accepted that there are other principles which override it [80] .

IRLR 377 at 382; The court in JA Mont (UK) Ltd v Mills [1993] FSR 577 at 587; Cheshire Fifoot and Furmston 401; Sales 601; Winfield 320, 324; Stewart v Stewart (1899) 1 F 1158 1164; Pratt v Maclean 1927 SN 161; BMTA v Gray 1951 SC 586 at 598; Macrae & Dick Ltd v Philip 1982 SLT ShCt 5 at 7; Christie *Encyclopaedia* 582; Edgcombe v Hodgson (1902) 19 SC 224 at 226; KWV van ZA Bpk v Botha 1923 CPD 429 at 437; Dempsey v Shambo 1936 EDL 330 338; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 347 with reference to Cheshire and Fifoot; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198 but see the criticism supra; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 501; Basson v Chilwan 1993 (3) SA 742 (A) 762.

76. Herbert Morris 699 emphasised the interests of "all those who desire to employ him".

77. Basson v Chilwan 1993 (3) SA 742 (A) 767, Rautenbach & Reinecke 555.

78. Stewart v Stewart (1899) 1 F 1158 at 1166; A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 623; Schoombee 129, See also 149; On a more direct effect see infra Ch 10.5.2.

79. Du Plessis and Davis 95-97.

80. Infra Ch 4.

- They submitted that the individual interests are not relevant within the doctrine because the test for upholding a restraint often merely emphasises the interests of the covenantee in determining whether a restraint should be upheld [81]. Courts emphasise the interests of the enforcer in determining whether the restraint should be maintained but that does not mean that the interests of the covenantor are irrelevant. His interests in work are already discounted when it is accepted that the contract falls within the doctrine [82].

The authors are correct in so far as they see the interest of the public in the services of an individual as the basis of the doctrine, although their view must be rejected where they contend, that this will be the sole ground for the doctrine.

9.2.2. Interest which society has in the ability of an individual to support himself

It has been emphasised in some cases that restrictions will be ineffective because they will cause the covenantor to become a burden on society [83] - an argument pertinent to the modern welfare state. This will not always be the case. A covenantor will sometimes be able to continue supporting himself, and the burden on society is clearly not the only aspect underlying the principle of freedom of trade. It is possible that a restraint might still be ineffective in restraint of trade even if the covenantor will not become such a burden upon society. However, it will remain one of the aspects underlying the protection of freedom of work.

10. Freedom to choose work

The principle of freedom of work also concerns the right to choose where and how such work skills should be exercised. It concerns the power to choose in what type of work relationship a person wants to be, the right to leave one work or production relationship for another, or the power to leave work relationships altogether [84]. Here "freedom" can best be interpreted as "freedom of choice".

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[81]. Otto 210 can be submitted to the same criticism.

[82]. See infra Ch 6.16.

[83]. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313; Schoombee 129.

[84]. Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 793, Quoted Esso 318, See Esso 293-294, Quoted in Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 614; Mason 741; Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1957] WLR 1012 at 1019; Faramus v Film Artistes' Association [1963] 2 QB 527 at 558; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 131, See Esso 307; Fellowes & Son v Fisher [1976] 1 QB 122 at 129; Clifford Davis Management Ltd v WEA Records Ltd [1975] 1 All ER 237 at 240; Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 391; Blake 627; Cheshire Fifoot and Furmston 411; Heydon *McGill* 328; Kales 195; Du Plessis and Davis 95-96; Walker 183; Woker 332; Nathan 37; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 171; Lubbe and Murray 239-240.

The phrase "freedom of trade" has also received this more restricted interpretation in some cases. In *McEllistrim* [85] Lord Shaw of Dunfermline stressed that the problem in this case was interference with freedom to change from one production relationship to another. If effective, the restriction would tie a member's "industry" and "daily occupation" for life.

The two legs of the freedom of work principle are closely intertwined. In a market economy and free society it is acknowledged that free choice will ensure optimum efficiency. This is also believed to be true of work skills. The ability to work is often directly interfered with if the ability to choose is undermined:

- In *M & S Drapers* [86] a restraint would apply after termination of an employment contract. Lord Denning mentioned that this restricted the freedom to leave the relationship. The covenantor had to choose between remaining within the relationship or having to submit to a post-employment restraint. The judge then showed how this could interfere with the ability to work and the aspects underlying it. The limits of choice would make it more difficult for the employee to improve his position during employment.
- In *McEllistrim* [87] Lord Birkenhead LC mentioned that limits on freedom to choose work in a particular location will often constitute complete fetters on trade. There are other factors that will make humans immobile, and limits on freedom to work in a particular area will often constitute a fetter on the ability to work as a whole.

This principle also contains an objective and subjective element. They are motivated by some similar factors but occasionally differentiation will be necessary.

11. Aspects unique to the freedom to choose work

In the subjective sense work necessarily involves the person who performs such work, and it will constitute a radical interference with personal liberty if a person has no control over work, even if the output itself or the reward from the work is left untouched. In some cases the courts have also equated limitations on freedom of work with slavery, and they have accordingly stipulated that such interferences cannot be accepted [88]. The comparison would be particularly apt here. Freedom

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[85]. McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 588.

[86]. M & S Drapers v Reynolds [1956] 3 All ER 814 at 820; See also Herbert Morris 718; See Hilton v Eckersley (1855) 6 El & Bl 47 55-56.

[87]. McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 565.

[88]. Rigby v Connol (1880) 14 ChD 482 at 490; Davies v Davies (1887) 36 ChD 359 at 393; Horwood v Millar's Timber and Trading Co Ltd [1917] 1 KB 305 at 312, 314, 317 although this issue was not clearly related to the doctrine; Herbert Morris 718; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 590; Despite emphasis on wider notions see Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 144; Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 351; Wedderburn 149; Highlands Park Football Club Ltd v

to choose how and where skills should be used are interfered with and the options of a covenantor are often limited by a restraint.

The principle of freedom of work comes into play in relationships where freedom of choice is in issue, although it must not be exaggerated. In *D'Oliviera* [89] it was emphasised that the court would be loath to interfere with sanctity of contract. Krause J accepted that restraints may sometimes be struck down. But he took too narrow a view of the circumstances that will allow the court to do so. He stated that a restraint will not be upheld where obligations are so unbearable and oppressive that they equal slavery. Yet, restraints that can be equated to slavery are just extreme examples of a type of contract that can also be ineffective even in cases where the interference is considerably narrower.

Objectively the public has a separate interest in ensuring that individuals have some freedom to choose work [90]. Wider freedom makes a wider tapping of work resources possible. In *Russell* [91] the court emphasised the ability of employers to canvass employees freely. In *Herbert Morris* Lord Shaw of Dunfermline [92] stated:

> "Under modern conditions, both of society and of trade, it would appear to be in accord with the public interest to open and not to shut the markets of these islands to the skilled labour and the commercial and industrial abilities of its inhabitants, to further and not to obstruct for these *les carrieres ouvertes.*".

On the one hand this may mean that the ability to work should not be restricted because the public has an interest in the fruits of work. However, it may also mean that entry into the market by choice should not be unnecessarily obstructed.

Freedom to choose work or the freedom not to be forced into a certain work relationship will be important aspects of the freedom of work principle. However, it does not give a complete picture of freedom of work. It is an important though probably subsidiary aspect of the principle of freedom of trade.

Viljoen 1978 (3) SA 191 (W) 200; Lubbe and Murray 239, Christie 455 with reference to Eastwood v Shepstone 1902 TS 294 emphasised that it is against public policy if contracts promote forced labour but the authors distinguished this from restraint of trade issues, See also: Zondekili v McKenzie (1897) 18 NLR 188, Eastwood v Shepstone 1902 TS 294 especially 302, Biyela v Harris 1921 NPD 83, Raubenheimer v Paterson & Sons 1950 (3) SA 45 (SR).

89. African Theatres Ltd v D'Oliviera 1927 WLD 122 at 127.

90. Blake 627 who related this to markets.

91. Russell v Amalgamated Society of Carpenters & Joiners [1910] 1 KB 506 at 516.

92. Herbert Morris 718.

12. The principles underlying the doctrine and the new South African Constitution

One important aspect that now separates South African law from the other legal systems under discussion is the Bill of Rights that forms part of the Interim Constitution. Sec 26(1) of the new Constitution [93] provides that:

> "Every person shall have the right freely to engage in economic activity and to pursue their livelihood anywhere in the national territory".

This is then qualified by sec 26(2) where it is provided that:

> "Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development social justice, basic conditions of employment, fair labour practice or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality".

Sec 26 is moreover qualified by the general limitation clause (sec 33), which states that rights may be limited provided the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and provided that it does not negate the essential content of the right in question. It must be established how these constitutional aspects will interact with the common law of restraint of trade.

In *Waltons* [94] and *Kotze* [95] the courts made short shrift of reliance on sec 26 of the Constitution. It was accepted that the principle expressed in sec 26 is similar to the one that formed the basis of the doctrine of restraint of trade. It was then acknowledged that this principle was undermined by legislation. Both Edeling J in *Waltons* and Conradie J in *Kotze* decided that sec 26 was aimed at such legislative undermining of freedom of trade [96]. The courts therefore accepted that the common law as expressed in *Magna Alloys* would still apply here.

This is correct if somewhat incomplete [97]. The common law doctrine is concerned with the same interest that underlies sec 26(1). A contract in restraint of trade can accordingly also be described

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93. Constitution of the Republic of South Africa 200 of 1993.
94. Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 510-511.
95. Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 786-787. Reliance was placed on Pierres Property Consultants v Brian Patrick (unrep).
96. For a discussion of the position in Scotland see Christie *Encyclopaedia* 604. See also on the presumption against restraints of trade in legislation Rossi v Lord Provost Corp of Edinburgh [1905] AC 21 at 27.
97. It might also be a question whether the Bill of Rights will only apply vertically. Authorities point towards the view that it will. Thus it is theoretically possible that it may play some role here. See Woker 329 at 330-331 and the discussion of sec 35(3) (the so-called seepage clause), Cachalia et al *Fundamental Rights in the New Constitution* (1994) 20; See the criticism Rautenbach & Reinecke 551-552, 554 and the explanation 556ff.

as unconstitutional [98]. However, where the common law expresses the same principle in terms of the doctrine it would probably be more acceptable to deal with it thus. The doctrine is not absolute, but then neither is the Constitution. The most important issue here will be to determine whether the limits on freedom of trade that the doctrine allows are justifiable in terms of the Constitution. It is submitted that the doctrine cannot broadly be faulted in terms of the Constitution [99]. Thus, the doctrine will probably be sufficient in the types of case that have until now been judged in terms of it. A party will probably not be allowed to rely on sections 26 and 33 of the Constitution as an alternative to the restraint of trade doctrine. Woker [100] states that it is not necessary to refer to the Constitution in determining restraint of trade issues. This should be more strongly put. Parties cannot argue a case merely in terms of the Constitution if the common law is able to deal with it adequately [101]. Conceivably the Constitution will not be irrelevant. The restraint of trade doctrine is an expression of public policy which is not static. The courts must express and develop the doctrine against the backdrop of the Constitution [102]. It may be shown that the doctrine in a particular case does not conform with the principles set out in the Constitution. But the Constitution will not directly impact on the doctrine.

13. Conclusion

The aim of the restraint of trade doctrine is to balance freedom of work and sanctity of contract. It will be important for proper development of principles to take a correct view of those principles. This will mean that priority may sometimes be given to one over the other. But none will ever become wholly dominant [103]. There will be a continuous interaction between two conflicting principles. The doctrine is not just an expression of laissez-faire economics [104]. It also has a considerable paternalistic dimension. It aims to instil the ethos of a modern freedom of work principle into the market place [105].

The principles that now underlie the doctrine are still of actual importance. In *Roffey* [106] the court stated that the current English position was brought about by the hardening of a series of

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98. Woker 332, 335.
99. Woker 333-335.
100. Woker 334-335.
101. Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 510-511.
102. Woker 335.
103. See SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 505, See Book v Davidson 1989 (1) SA 638 (ZS) 647 the court apparently criticised SA Wire but it then made essentially the same point.
104. But see Wedderburn 149 laissez-faire at one stage exerted strong influence over it.
105. On illegality and this type of legal function see Hugh Collins *The Law of Contract* (1986) 117 discussed Lubbe and Murray 242.
106. Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 502.

principles that developed with a particular problem of a bygone era in mind. But this is clearly incorrect. The restraint of trade doctrine today is based on principles that are relevant now even though the doctrine may have been founded on principles that will not be actual today. It is wrong to over-emphasise the origin of the restraint of trade doctrine in the Statute of Monopolies in England [107]. It is perfectly legitimate to argue that the principles that underlie the doctrine have different values in South Africa and that the South African doctrine should accordingly be developed along indigenous lines. But a move away from the classic English doctrine cannot be justified on the basis that the principles underlying the doctrine have become obsolete in England.

[107]. Suzman 90 at 91.

Chapter 4

The scope of the restraint of trade doctrine

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1. The scope of the restraint of trade doctrine

Little attention was initially paid to the scope of the doctrine by courts and text-writers alike:

- The jurisdictional question regarding the application of the doctrine, was fused with the substantive question pertaining to the effectiveness of a restraint. Courts simply asked whether a restraint was reasonable or, in some cases, did not clearly distinguish between the two questions [1].
- Courts sometimes assumed that contracts were within the purview of the doctrine and concentrated on the substantive aspects [2].
- In the run-of-the-mill sale of goodwill, post-employment, and post-partnership restraints, it is often clear whether the doctrine should apply and it was sometimes thought that the restraint of trade doctrine only applied to this numerus clausus of contracts [3].
- The scope issue was often not taken up for practical reasons. In many borderline cases counsel for the covenantor would probably not argue that the contract falls within the doctrine because it would, in any event, be effective in terms of the substantive test [4].

Yet it is now open to the courts to decide whether a certain contract or category of contracts should fall in or outside the doctrine. This question is fundamental in the non-traditional types of cases but it will also be of some importance here. Most of the discussion regarding the scope of the doctrine has taken place in England, and English law will be emphasised, but there is nothing to indicate that South African [5] and Scots law [6] differ from it.

2. Justification for separating jurisdictional and substantive questions

Most recent authorities have acknowledged that it is necessary also to ask a jurisdictional question [7], but acceptance of this notion is not unanimous. In *Instone* [8] the court contended that a general

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1. See Esso 296-297, 331, 338-339 and the cases mentioned; Collinge 412.
2. Esso 295 and the cases discussed; See also Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1933] AC 181 at 189 where the question was left open; Giblin v Murdoch 1979 SLT ShCt 5 at 6, See Campbell 281.
3. See infra 5.
4. Esso 306; Pharmaceutical Society (GB) v Dickson [1968] 2 All ER 686 at 699.
5. SA Wire Co (Pty) Ltd v Durban Wire & Plastics Ltd 1968 (2) SA 777 (D) 785-786 after looking at: Shell Co of SA Ltd v Gerrans Garage (Pty) Ltd 1954 (4) SA (G), Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140 and Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) 171.
6. MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95 at 99.
7. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 321 although the more narrow view of Lord Hodson was referred to 324; Cheshire Fifoot and Furmston 401; Walker 184; Campbell 281; Cf A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 618 where a somewhat different approach was followed. The court mentioned that the question is whether the contract should be justified or whether it cannot be justified at all.

approach could be followed and that it was unnecessary to class some restrictions as falling inside the doctrine, and others as falling outside. The reasons for and the criticism of the distinction will therefore have to be discussed.

2.1. Grounds for asking jurisdictional questions

Attempts to justify the two-stage test with administration of justice arguments can be cursorily dealt with.

- It has been stated that a wide application of the doctrine may provide greater scope for procedural "chicanery and delaying tactics" [9]. But Heydon correctly answered this point: procedural abuse can be penalised through awarding costs against the party whose behaviour is unacceptable [10].
- It has been mentioned that a wide application of the substantive doctrine will increase the amount of litigation concerning the restraint of trade doctrine [11]. But Heydon [12] is probably correct in stating that a sensible one-stage test will not open the floodgates of litigation although it may increase slightly.

Moreover, Lord Reid in *Esso* [13] argued:

> "And in the ordinary case the court will not remake a contract; unless in the special case where the contract is severable, it will not strike out one provision as unenforceable and enforce the rest. But here the party who has been paid for agreeing to the restraint may be unjustly enriched if the court holds the restraint to be too wide to be enforceable and is unable to adjust the consideration given by the other party".

But the problem of unjust enrichment is not unique to this area of public policy, while many of the severability problems are not insoluble here [14]. It might be important to categorise restraints separately because different rules of severability might apply [15]. However, severability rules will, if

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8. Instone v A Schroeder Music Publishing Co Ltd [1974] 1 All ER 171 at 177 with reference to Heydon, See Dawson 458; Heydon infra 2.1 his discussion boils down to the same conclusion; Cf also Esso 306, Lord Wilberforce 331 acknowledged that the common law has "thrived on ambiguity".

9. Esso 325, Collinge 418.

10. Heydon 76-77 (the discussion of the scope of the doctrine in Heydon's book is the same as an article he previously wrote 1969 *LQR* 229; in this chapter reference will be made to the passages from the book); Cf Instone v A Schroeder Music Publishing Co Ltd [1974] 1 All ER 171 at 177.

11. See Dawson 458.

12. Heydon 77.

13. Esso 295, See Heydon 75.

14. See infra Ch 14; The argument of Heydon 76 where he stated that unjustified enrichment can be justified by comparing morality is completely unacceptable see infra Ch 12.4.2.

15. Heydon 76 and his discussion of severability see infra Ch 14. The severability argument mentioned by Heydon

anything, be wider than in other areas of public policy.

These reasons for utilising two stages must be rejected. The real reasons for the separation of the jurisdictional and substantive questions are twofold. It can be justified by principle as well as by pragmatic and systemic considerations.

Certain general policy principles may necessitate the exclusion of the operation of the doctrine. Many principles can be discounted in terms of the doctrine itself but others will be unacceptably undermined even by the mere application of the doctrine [16]. The doctrine of restraint of trade should not override basic constitutional principles or fundamental tenets underlying the property system.

The specific principles that are normally balanced in terms of the doctrine may furthermore require the exclusion of a contract from the doctrine. Thus the narrowing down of the jurisdiction of the doctrine is largely necessitated by that omnipresent bogey, the principle of sanctity of contract [17]. The doctrine concerns the balancing of freedom of work and sanctity of contract, and a too wide doctrine will unnecessarily interfere with the latter.

The exact interference with sanctity of contract must be precisely delineated. A contract will not be ineffective merely because it is regarded as a restraint of trade. The classification of a clause as a restraint will not interfere with sanctity of contract on this basis. However, classification as a restraint has a considerable impact upon the certainty of the contract and the relationship of the parties in other respects:

- In England and Scotland an onus to prove that the contract is effective will come to rest on the party who wants the contract enforced [18]. Sanctity of contract will accordingly be undermined by classing a contract as falling within the doctrine even if such a contract is eventually found to be effective [19]. Heydon [20] tried to counter this argument by stating that:

> "there is very rarely any doubt that those covenants [covenants where the onus is not satisfied] are in fact undesirable and deserve to be unenforceable".

75-76 does not really concern the issue under discussion here.

16. This ground probably underlies the "existing interests" test proposed in Esso.

17. See Collinge 410, Campbell 285.

18. Heydon 76 although he put it too strongly; Whish *Stair Encyclopaedia* 1212.

19. Pharmaceutical Society (GB) v Dickson [1968] 2 All ER 686 at 698-699, See 690 where the court doubted whether the onus in professional society cases should be on the society. The issue was finally left open.

20. Heydon 76.

However, his point is not borne out by many of the cases. Onus, and the role which onus plays in the restraint of trade context, will have a considerable impact on the reasoning of judges [21].

- The contract can be ineffective for being unreasonable. Generally a contract cannot be rendered ineffective on this basis in most other areas of contract law [22]. In South African law the party who argues that the contract is illegal will have to prove it in all cases [23]. But sanctity of contract is also undermined on this ground. This criticism is not answered by the proponents of a wider view [24].

These forms of interference are not always properly observed by Heydon and other authorities arguing for a wide application of the substantive doctrine. Thus Heydon asserted that widening the doctrine would not interfere with sanctity of contract [25], because the substantive reasonableness test would continue to ensure that only a limited amount of contracts will ultimately be found to be ineffective [26]. But the interference is on a much more fundamental level even if Heydon's argument is accepted. Sanctity of contract is not an absolute principle in the legal systems under discussion. Courts interfere with it regularly but this should only be done if there are sufficient grounds.

Furthermore, there are systemic and pragmatic reasons for limiting the operation of the doctrine by delineating the field of its operation [27]. The doctrine developed as a solution to very specific problems. It will not be appropriate to deal with all contracts that may, in the widest sense, be described as restraints of trade in terms of the doctrine. It will strain the specific substantive test if it has to deal with situations that do not properly belong there.

This, more than any other aspect, underlines the importance of demarcation of the doctrine in South Africa. There, specific rules and procedures still form what can be described as "restraint of trade law". It remains pivotal to circumscribe the types of contracts that will be singled out for such treatment. Christie [28] avers that it is not really necessary to determine the scope of the doctrine in post-*Magna Alloys* South African law, but he admits that it will still be helpful to distinguish contracts that fall within the doctrine from contracts that do not "as an aid to clear

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21. See infra Ch 11.3.
22. Esso 295; Collinge 410; See Bank of Lisbon and South Africa (Ltd) v De Ornelas 1988 (3) SA 580 (A) where the exceptio doli generalis was rejected; See the discussion infra Ch 5.3.
23. See infra Ch 11.5.
24. Heydon 75-76 did not separate this question from other completely different problems. He tied it in with the question of a windfall in the case of ineffectiveness but this is a different issue see infra Ch 12.4.2.
25. The argument has been here represented in a different order than Heydon did in his book see especially 75-77.
26. Heydon 77, See also 76.
27. See Collinge 415.
28. Christie 434.

thinking". It is submitted, however, that the scope question should play a more important role than that. It will still be important to determine in every case when the unique aspects of the South African law of restraint of trade should apply.

2.2. Criticisms of the application of a narrow jurisdictional question

Thus there are sound theoretical reasons for framing a properly limited jurisdictional question. The sanctity of contract principle cannot be theoretically side-stepped. But some practical problems with the application of a dual test have been foreseen.

It has been stated that the same evidence may not necessarily be relevant in determining the jurisdictional and substantive question, and that the two questions should accordingly be distinguished [29]. Heydon foresaw difficulties [30]:

- He contended that the two-stage doctrine would lead to problems in the production of evidence and averred that it would be difficult to determine at what stage different pieces of evidence should be tendered. However, the production of evidence will be simple. All evidence required for the proof of different legal points must be placed before the court at one stage. There will be a general jurisdictional question that the court will first have to ask on the basis of the evidence before it, and thereafter more specific questions will have to be answered on the basis of that same corpus of evidence. Only aspects of evidence that the court will consider will differ. Incidence of onus will have to determine the outcome of any one of these questions if the necessary evidence is not before the court.
- He averred that a one-step production of evidence will not justify a two-stage restraint of trade decision. But there is no reason why this should be so. The two-stage procedure is still the most effective technique for dealing with the singular corpus of evidence. It answers different questions that must be kept apart.

Moreover, the doctrine is not only concerned with cases decided in courts. It also establishes rules and principles for parties who have to draft contracts and to resolve disputes outside courts. In both the planning of relationships and the resolution of out of court disputes it will be important to be able to distinguish between contracts that fall within the doctrine and those that do not.

The strongest argument for taking a wide view of the jurisdiction of the doctrine was also put

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[29]. Esso 326, Cheshire Fifoot and Furmston 401, Walker 184; Cf however SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 787 the court was prepared to decide jurisdictional issues on exception as it did not regard evidence as important in casu.

[30]. Heydon 73 in his criticism of Lord Wilberforce in Esso although it should have wider application.

forward by Heydon [31]. He accepted that the opacity and rigidity of all further limitations of the restraint of trade doctrine will militate against formulating a separate jurisdictional question. He argued that the circumstances where a restraint, in the widest sense, will be ineffective, and the cases where it will not, are so inextricable that they can never be properly distinguished [32]. Hence, the tests for determining the scope of the doctrine will, according to him, be unsuitable for accommodating the fine balancing of principles necessary in these cases.

However, this argument must also be rejected. Heydon stated that certainty and predictability would be fundamentally important here [33]. But in this field courts are concerned with public policy, which almost always entails some vagueness [34]. It is fundamental that the jurisdictional question must have a core of certainty, making it possible to plan contractual relationships, while contracts where freedom of work needs to be protected should not be excluded from the doctrine. This can be achieved if the principles underlying the doctrine are kept in focus, and if the scope test is properly developed [35].

3. The scope of the doctrine in relation to public policy

Wide definitions of restraints have been laid down by the courts. If applied literally many, if not all, contracts will fall within the ambit of the doctrine. But a simple definition cannot be used as a limiting device [36].

It must be continuously asked whether a contract can be rationally linked to infringement of the principles underlying the doctrine to such an extent that it should be further investigated in terms of the doctrine [37]. The net should be cast widely and questions as to reasonableness should not yet

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31. Heydon 71, 77, See also Heydon 63 and the criticism.
32. Heydon 77 quoted by Du Plessis and Davis 92 in South Africa.
33. Heydon 63.
34. Esso 331; Cheshire Fifoot and Furmston 403; Esso 331; Campbell 283, 285.
35. Esso 331 Lord Wilberforce puts forward a solution that can be of much value although it will not be discussed here because it is not relevant to the older types of restraints infra 5; Cf Trebilcock 42.
36. Esso 294ff, 307, 324-325, 333, Cf however Lord Hodson who simply adopted the wide definition in Petrofina and Lord Hodson Pharmaceutical Society (GB) v Dickson [1968] 2 All ER 686 at 699, See Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 321-322 and his interpretation of Lord Reid 294 is not acceptable. The term is used in the narrow sense in both cases; Cheshire Fifoot and Furmston 401-402; Chitty 1191; Collinge 414; Treitel 402; Atiyah 339; McBryde 591; Whish *Stair Encyclopaedia* 1212; SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 783-784; Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 439; Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) 439-440; Christie 434; Du Plessis and Davis 92 although they also mentioned suggestions of Heydon.
37. Esso 307, 308; Bridge v Deacons [1984] 1 AC 705 at 713 although the court did not always distinguish jurisdiction and substantive issues; Cf Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 where the court saw this as a principle underlying the entire doctrine; Anson 318; Cheshire Fifoot and Furmston 401-402; Chitty 1191; Letinvest plc v The Victor Tramway Ltd 1994 SCLR 164 at 165; SA Wire Co (Pty) Ltd v Durban

come into play [38].

The solution proposed in this work will still not work magically. Collinge [39] stated that a test based on degree cannot be acceptable here, but this is inevitable in restraint of trade law. Public policy does not allow for clear delineation. A rational rule of reason will still be pivotal. In *Esso* [40] Lord Wilberforce put it thus:

> "The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason .... It is not to be supposed, or encouraged, that a bare allegation that a contract limits a trader's freedom of action exposes a party suing on it to the burden of justification..."

3.1. Heydon, George Michael, and the normal or general meaning of the phrase "restraint of trade"

Two compromise positions must accordingly also be rejected. Heydon distinguished three issues that should be determined here [41]. The first two boil down to the question: Is the contract in restraint of trade? He then argued that the phrase "restraint of trade" should for this purpose be interpreted in its general normal sense [42]. In *George Michael* [43] Parker J suggested that the courts first determine whether a clause can, in common parlance, be called a restraint of trade. He then proposed that they should thereafter determine why the contract should not be justified in terms of the doctrine. He emphasised that the second leg should be of a negative nature.

But policy principles with a particular content underlie the restraint of trade doctrine. The question whether a contract is a restraint of trade must be considered in the light of these principles. There are no other cases where this approach was followed, and it was explicitly rejected in *Bull* [44].

Moreover, it is also doubtful whether the word restraint and, especially, the word trade have any one relatively specific normal meaning [45]. The courts have never attempted to establish the elusive

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Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 784; Cf however the criticism Guest 9.

38. Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413 at 427-428 cannot be accepted.

39. Collinge 415.

40. Esso 331-332.

41. Heydon 48; Collinge 411 also distinguishes the two questions.

42. Heydon 48-49, 52.

43. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 327.

44. Bull v Pitney-Bowes [1967] 1 WLR 273 at 281 with reference to the judgment of Lord MacDermott in London Graving Dock Co Ltd v Horton [1951] AC 737 at 761; Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413 at 427, See the same judge in Esso 331; AD Neal *The Antitrust laws of the USA* 2nd ed (1970) 18-19.

45. See supra Ch 1.

normal meaning of the phrase "restraint of trade". Parker J's definition of what constitutes a restraint in common parlance is very vague [46]. It would avoid many difficulties if a meaning for the phrase "restraint of trade" could be plucked from the air, but it cannot. The courts here necessarily have to deal with policy issues. Heydon's approach must be judged in the light of his hidden agenda. In his view restraint of trade should be interpreted widely so that all questions can be answered by the substantive test [47]. According to him a "restraint" is a fetter which limits future liberty of action vis-à-vis third parties [48]. The only further exclusion from the term would be through the de minimis rule [49]. Moreover, Heydon did not really address the meaning of the word "trade" [50].

Hence the first leg of the test proposed in *George Michael* is not viable either. The second leg depends on it and the whole test must therefore be rejected, although the court took a narrower and more acceptable view than Heydon. Yet the broad principle underlying the discussion of Parker J may still be of some use in developing an appropriate two-stage test.

3.2. The two tiers of the jurisdictional test

Courts should ask whether there is a clause that can be said to interfere with the principles underlying the doctrine, and they should thereafter determine whether the doctrine should apply to such a contract in the light of the particular contractual relationship of which it forms a part. These two issues have not always been clearly distinguished, but they are often visible. It is not necessarily unacceptable to merge them, but they will be discerned for the purpose of discussion.

4. Does the restraint clause sufficiently undermine the principles protected by the restraint of trade doctrine?

Freedom of work underlies the doctrine [51]. Thus the question is whether a particular clause offends against this principle. This is more specific. In the widest sense it will perhaps still be possible to say that almost every obligation can be related to these narrower principles. But only terms that, in a proper and rational sense, offend against the ascribed principles should be so regarded.

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46. See Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 342.
47. Cf Collinge 414 and the equally wide view taken here with reference to the definition in Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 138 although the author did not mention concepts like normal interpretation.
48. Heydon 49-51; Collinge 414.
49. Heydon 51 and the references to the annotators of Mitchel v Reynolds (1711) 1 PWms 181.
50. Heydon 52 and his discussion of British Motor Trade Association v Gray 1951 SC 586.
51. Supra Ch 3.7ff.

A term will clearly be a restrictive covenant if it contains a direct negative contractual obligation that restricts a person from working in certain areas. However, courts should not be formalistic. The problem here is one of public policy; judges must ignore legal niceties and look at the practical effect of a clause [52].

- Contracts that tie the accrual of certain advantages, like the payment of a pension or other privilege, to a condition or obligation prohibiting a person from doing certain work may fall within the doctrine if the practical effect is also specific interference with the freedom of work [53]. It might sometimes be difficult to distinguish between restriction and profit-sharing, but these distinctions will be drawn by looking at the practical effect of the clause against the backdrop of the principles underlying the doctrine [54].
- A scheme according to which the covenantor would be forced to restrict his freedom of work, or pay certain penalties, may also be in restraint of trade [55]. A conditional obligation that can only be avoided by not exercising freedom of work will in appropriate cases be in restraint of trade. The court will again have to look at the purpose of obligations. In *Tool Metal* [56] compensation had to be paid where a quota was exceeded. The court asked whether it could be said that "the sum to be paid as compensation is so large that it must have the effect of limiting output". This is correct, although the application on the facts is questionable. The court placed excessive emphasis on profit margin and the lack of proof of actual constraint [57]. In *Neil* [58] a trainee employee agreed to pay certain sums on leaving

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52. Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402-403, See Heydon *McGill* 328-329, Chitty 1192, 1203; Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 390; Chitty 1203; Schacklock Phillips-Page (Pvt) Ltd v Johnson 1978 (1) SA 321 (RA) 325; Cf the application of the same principle in a slightly different context: Pharmaceutical Society of GB v Dickson [1968] 2 All ER 686 706-707, MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95 at 100, See Campbell 282.

53. See also the discussion in Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 807, 808, 808; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 especially 282; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402-403; Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 390-391; Heydon 51, 203; Heydon *McGill* 358; See Walker 192; Schacklock Phillips-Page (Pvt) Ltd v Johnson 1978 (1) SA 321 (RA) 325; See Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 where both parties treated the restraint as a contract. The court accepted that problems otherwise might have arisen; Cf In Re Prudential Assurance Co's Trust Deed [1934] 1 Ch 338 where the court simply assumed for the purpose of the case that the clause was unenforceable; Cf also the facts of Alder v Moore [1961] 2 QB 57 a clause of this nature will probably today fall within the doctrine although the doctrine was not discussed here.

54. Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402-403, See Heydon *McGill* 328-329.

55. Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140 at 150.

56. Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1954) 71 RPC 1 at 11-12.

57. Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1954) 71 RPC 1 at 11-12 preferred the view that a compensation clause was not in casu in restraint of trade although it was clearly accepted that such a mechanism may constitute a restriction in appropriate circumstances, See the criticism of Heydon 50, On Appeal Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 2 All ER 657 at 687 the court was sceptical of the notion that the particular levy was in restraint of trade although the question was finally left open; Cf Heydon 50 also referred to Holcomb v Nixon (1855) 5 Gr 278 at 372.

58. Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90.

employment within two years. The court did not discuss the jurisdictional issue in any detail and the sheriff made some dubious statements. But the application of the doctrine could have been excluded here. The courts will have to determine whether it is one of the direct consequences of the clause to restrict freedom of work. The duration of the obligation here was too short to justify such a conclusion.

- Restrictions that might indirectly constitute restraints on work will also fall within the doctrine where there is a proper link with interference against freedom of work. This is illustrated by the restrictions on the use of a certain name or title. In *Hepworth* [59] an actor agreed that he would not use the pseudonym under which he performed after leaving the employment of the defendants. The court accepted that the restriction was a restraint on the ability of the actor to work even if it operated indirectly. In the more recent *Fyffes* [60] case the court took a narrower view, doubting whether a restriction on using a trade mark was a restraint of trade. But the doctrine should not be too conservatively applied, although contracts where the name is sold as a trademark might fall outside the doctrine on other grounds, and although restrictions on using a name in sale of goodwill contracts will probably be protectable as a proprietary interest by the buyer in terms of the substantive test [61].
- Some positive obligations may also in future be held to be restrictive covenants, although there is little direct authority for this [62]. Positive obligations have a restrictive effect in the sense that they often cause the exclusion of other possibilities. However, this issue will have to be approached with caution. Heydon [63] mentioned the example of a person who agrees to live in Paris and accordingly is deprived of the ability to run a butcher shop in the United

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[59]. Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1, See 67-68, Chitty 1192, Apple Corps Ltd v Apple Computer Inc [1992] RPC 70 at 79, Cf also Lotinga's case (1913) Times Nov 13-15, 17 and 25; Cf also Wolmerhausen v O'Connor [1877] 26 LT 921 where the court apparently accepted that a restraint against representing a previous connection with the covenantee was inside the parameters of the doctrine; Heydon *McGill* 327 takes a wide view with reference to Hope J in the Australian case of McGuigan Investments Pty Ltd v Dalwood Vineyards Pty Ltd [1970] 1 NSWR 686.

[60]. Fyffes plc v Chiquita Brands International Inc [1993] FSR 83 at 105; See Vernon v Hallam (1886) 34 ChD 748 at 751 where the court accepted that restriction of a business name in a sale of business is not in restraint of trade; Cf Connors Bros Ltd v Connors [1940] 4 All ER 179 at 189 where the court simply stated that difficult problems could arise with regard to such restrictions; Cf also where a person is restricted from advertising that he as been connected to a certain business. Such restrictions will often be justifiable: Wolmerhausen v O'Connor (1877) 36 LT 921 where the court accepted a restraint by a partner against advertising that he was connected to a certain business, Konski v Peet [1915] 1 Ch 530, GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 14; Measures Bros Ltd v Measures [1910] 2 Ch 248 where the covenantor was also restricted from allowing his name to be used in connection with a certain type of business.

[61]. The court in Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 14 explained Vernon v Hallam (1886) 34 ChD 748 at 751 on the basis that it was another type of contract but this issue should only come to the fore in determining reasonableness.

[62]. See Nelson 39; Cf also the role of keep-open clauses in petrol solus agreements such as Esso. It is not clear whether the court regarded them as restraints.

[63]. Heydon 53.

States [64]. He accepted that such a clause will not be a restraint of trade and he argued that it will be important to look at the purpose of clauses. Agreements for the performance of services for improper remuneration may in appropriate cases be regarded as restraints of trade [65]. In *Tamarillo* [66] a franchisee agreed that leases of business premises on which the franchise business was carried on would be transferred to the franchisor on termination of the franchise. The court contended that this clause was not in restraint of trade, but the purpose of this clause was clearly to restrain the trade of the covenantor as developed on the premises. This might be reasonable, but that is not an issue which should hold up the court at this stage. In *Letinvest* [67] a lessor took a lease of a unit in a shopping centre subject to a clause that he would not take up a lease for certain businesses in an adjacent rival complex. The sheriff held that the clause was not in restraint of trade, as it did not oblige the covenantor not to trade in another shopping centre. But it forced him to make a choice, and the sheriff's approach again seems excessively formalistic.

It may sometimes be difficult to determine whether a restriction restrains work even if it operates by direct negative obligation. What constitutes work activities will have to be determined from one case to another. Loosely, a clause that restricts activities of an individual that are performed for income by using skills and abilities will constitute a restriction [68]. The distinction between such activities is clearly drawn in *Nagle* [69]. Here the court found that the practice of the Jockey Club, a body that controlled racing in Britain, of refusing grants of trainer licences to women simply on the grounds of gender could be against public policy, inter alia, on the grounds of restraint of trade. However, Lord Denning MR [70] mentioned that it would not be the same where a social club refused membership to a person, and he emphasised that the Jockey Club could, by making rules, put a person out of business.

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64. Cf Monkland v Jack Barclay [1951] 2 KB 252 at 265 refused to accept that an obligation to deliver a car against the background of a protection scheme would be in restraint of trade; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 374 rejected the notion that a sale of property like copyright that gave exclusive use to the buyer could be in restraint of trade; Dawson 458 cannot be accepted; Cf it might in future in cases like Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1903] AC 414 be asked whether a contract is a restraint; Cf also Performing Rights Society Ltd v Magistrates of Edinburgh 1922 SC 165 where it was held that a society which obliged rights holders to transfer their rights to it so that they could be promoted and protected by the society was not in restraint of trade. But the court accepted that a duty to transfer future rights was in some ways restrictive although it did not constitute a restraint here.

65. Cf Rowe v Walt Disney Productions [1987] FSR 36. The court did not find unconscionability. But there is no restraint of trade issue here even if unconscionability came into play the assignment probably can not be described as interference with work.

66. Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A).

67. Letinvest plc v The Victor Tramway Ltd 1994 SCLR 164 at 165.

68. Cf for instance Buckley v Tutty [1970] 3 NSWR 463 especially the discussion 472 were the court held that paid rugby league players worked, See Heydon *McGill* 326.

69. Nagle v Feilden [1966] 2 WLR 1027.

70. Nagle v Feilden [1966] 2 WLR 1027 at 1032.

Finally, it may be difficult to determine whether a clause that restricts the freedom of work of third parties constitutes a restriction of trade. Many clauses will impact on the freedom of work of third parties, but when will they be restraints of trade? It can firstly be argued that the restraint of trade doctrine is only concerned with the parties to a contract, but this is too formalistic to be applicable in this area of public policy [71]. It has not been accepted in the courts. The question whether interference with the interests of third parties will constitute restrictions will again be one of degree that must be answered in the light of the principles underlying the doctrine and the purpose of the clause. It is fundamental that parties should have the power to indulge freely in commercial activity without constant concern for the freedom of work of third parties. However, direct interference with freedom of work will have to be contemplated in terms of the doctrine.

- In *Kores* [72] two companies agreed that they would not employ each other's employees. Scope issues were not alluded to, and the case was decided on the basis that the non-poaching clause operated as a restraint between the contracting parties. But the court was also strongly of the view - although it finally did not decide the case on this point - that the restrictions which this contract placed on the employees could also cause ineffectiveness [73]. Here the contract had a direct impact on the freedom of employees even though they were third parties, and the doctrine would probably have been applied even if the contract did not constitute a restriction inter partes [74].
- *Eastham* [75] concerned the retain and transfer rules of professional football in England. A footballer was directly bound by contract to a club and agreed to obey certain restrictive rules when leaving the club for another. Wilberforce J accepted that the restrictive rules as between the clubs were within the ambit of the doctrine. The court could declare them ineffective even on insistence by a third party like a football player. There was again a direct connection between third party football players and the rules of the organising body.

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71. Heydon 52; BMTA v Gray 1951 SC 586 at 598 would probably not be accepted in Scots law today, See the criticism Heydon 52, Contra Lord Russell 602 although the judge considered similar factors in holding that the restraint was reasonable, Lord Keith 604 apparently thought that this issue carried some weight. The judge did not however properly distinguish whether third parties could plead illegality and the question whether third party interests would be relevant in determining illegality and he did not finally decide these issues.

72. Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108, See Sales 608.

73. Cf also Showell v Winkup (1889) 60 LT 389 but the effectiveness of the particular clause did not come into play; Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 125-126; Mineral Water Bottle Exchange and Trade Protection Society v Booth (1887) 36 Ch 465 where the position of third parties was also stressed in determining effectiveness although the scope issue was not in question; Cf also Nisbet v Edinburgh and District Aerated Water Manufacturers' Defence Association Ltd (1906) 14 SLT 178 where the restrictions by employers inter se were emphasised.

74. See also Sales 601 he is probably correct that mere non-solicitation would not be a restriction on other employees, But see 607-608 the arguments seem to be too market-based.

75. Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413. See Sales 605; See Greig v Insole [1978] 3 All ER 449 at 495-496.

The rules were directly aimed at restricting the freedom of work of footballers [76].

- In *Nagle* [77] the court accepted that there were good grounds for declaring illegal a practice of the Jockey Club that interfered with the ability to work of women trainers of horses. This is probably the furthest that the courts will be prepared to go (although the issue was not finally decided on the facts in this case). The Jockey Club was an organisation with a virtual monopoly over racing. It had the function of regulating it. The practice was directly intended to impact on the ability of work of a particular group of people.

5. Investigation of the contractual relationships of which restrictive covenants form a part

Obligations seldom exist in isolation. They form part of wider contractual relationships. The question whether an obligation falls within the restraint of trade doctrine will therefore have to be determined with due regard for such relationships.

There will be no problems on the second level with the types of restraints that are discussed here. It has been argued that the restraint of trade doctrine only applies in a numerus clausus of restrictions, viz. post-employment, post-partnership, and sale of goodwill restraints. Most cases on restraint concern these standard type relationships [78]. Here the restraint operates after the relationship between the parties has been terminated; there is nothing that can be balanced against the existence of a restriction of trade.

In many of the other restraints the problems really start here. The courts have expressly refuted the numerus clausus approach [79] on the basis of principle and authority [80]. It conflicts with the fundamental idea that the restraint of trade doctrine is based on public policy. There are cases

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[76]. Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413 at 440ff.

[77]. Nagle v Feilden [1966] 2 WLR 1027 especially 1041-1042.

[78]. See infra Ch 5.1; Treitel 422 initially courts were reluctant to extend the restraint of trade doctrine beyond the standard types of restraints; See also the reluctance Shell Co of SA Ltd v Gerrans Garage (Pty) Ltd 1954 (4) SA 752 (G) 755-756.

[79]. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 131, 139-140, See Heydon 54 although he is incorrect in accepting that the issue was decided in Esso on the basis of authority only; Esso 295, 306, 337; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 324-325; Atiyah 339; Collinge 411, 415-416; Cheshire Fifoot and Furmston 403; Chitty 1192; Koh 72; PVB 309; Turpin 109; Campbell 282; Trebilcock 39-40; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 74; Schacklock Phillips-Page (Pvt) Ltd v Johnson 1978 (1) SA 321 (RA) 324; See also the Australian case of Quadramain v Sevastapol Investments Pty Ltd (1976) 50 ALJR 475 at 479 per Gibb J.

[80]. There are still older cases where this approach was apparently not followed: Young v Timmins (1831) 1 Cr & J 331, Jones v Lees (1856) 1 H & N 189, Servais Bouchard v The Prince's-Hall Restaurant Ltd (1904) 20 TLR 574 although this case is not clear, Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181.

outside the numerus clausus where freedom of work may be severely interfered with. The doctrine cannot be stultified; it must be susceptible to the requirements of public policy and changes therein.

> "The factual situations which invite the application of the doctrine must needs change with prevailing economic and social conditions and it is important to bear in mind that those referred to later in this chapter are not exhaustive. 'The classification must remain fluid and the categories can never be closed' [81]."

Baker in a note [82] suggested that the doctrine be restricted to the traditional categories of contracts, as there is now adequate legislation to deal with monopoly issues. But this argument must also be rejected. The doctrine is not primarily concerned with anti-monopoly aspects. The author did not properly contemplate the real principles underlying the doctrine.

Relationships where restrictive clauses should be regarded as falling within the doctrine will have to be distinguished from those where restrictive clauses should not have this effect. Relationships will be of much greater importance here. These restraints often apply contemporaneously with a wider production or work relationship. There might be wider public policy reasons for excluding certain relationships from the doctrine. Wider relationships may show that the restraint does not on the whole offend against the principles underlying the doctrine. The sterilisation and absorption test, the existing interests test, and Lord Wilberforce's test in *Esso* all operate on this level. Fundamentally difficult questions will arise but luckily these conundra need not detain us here.

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[81]. Esso 337 quoted Anson 319; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 131; Korah *JBL* 252; PVB 311; Guest 9.
[82]. PVB 310.

Chapter 5

The substantive doctrine: an introduction

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1. The substantive restraint of trade question in context

When it is established that a certain contract falls within the restraint of trade doctrine it must next be determined whether that contract should be condemned for being in restraint of trade [1]. Much has been said and written on restraint of trade [2] and most of it concerns this issue. But an attempt will be made to take stock of the state of modern restraint of trade law.

Different methodologies are currently being used for determining the effectiveness of the classic restraints, i.e. post-employment, sale of goodwill, and post-partnership restraints on the one hand, and all other types of restraints on the other [3]. The majority of cases concern these classic restraints [4].

The methods for determining effectiveness will be examined, and an attempt will be made to establish a more layered reasonableness test in the classic cases. There are many different factors that can be considered in determining reasonableness, and an investigation will be made into two important aspects: which factors should be considered, and what weight should be attached to them? This objective will be combined with the general motivation of this thesis, which is to explain the restraint of trade doctrine in terms of certain public policy objectives.

2. The Nordenfelt test

The current substantive test used in England and Scotland for determining reasonableness was developed around the turn of the century in English law. The classic exposition of this test can be found in the judgment of Lord Macnaghten in *Nordenfelt* [5]:

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[1]. Rautenbach & Reinecke 561 suggested that restraints should be viewed in a positive light as contracts that protect goodwill or other trade interests are normal but that cannot be done at this stage. This has not yet been established. All that can be said is that the contract restrains trade because it has not passed the scope test.

[2]. Supra Ch 1.

[3]. Petrofina (Great Britain) Ltd v Martin [1966] 1 All ER 126 at 140; Davies 491; See infra Ch 6.16, 6.17; Cf the criticism of this Korah JBL 251 is not based on a correct view of the principles underlying the doctrine.

[4]. Esso 293 where it is stated that counsel could only find about 40 cases where restraint of trade was pleaded in cases that were not classical, See Heydon 205; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 190; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 139; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 323; Atiyah 338; Whish *Stair Encyclopaedia* 1209; SA Wire Co (Pty) Ltd v Durban Wire & Plastics Ltd 1968 (2) SA 777 (D) 783.

[5]. Nordenfelt 565 although the test was not plucked from the air. See the cases mentioned in the discussion of the interests test infra 6.2, It was enshrined in a series of cases: Herbert Morris 689 and 707, Mason 733 and 739, Attwood v Lamont [1920] 3 KB 571; The cases where this test was applied are too numerous to mention but it was again confirmed in the most recent cases: Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 328, 359 and the cases referred to; For confirmation that the position in Scotland is more or less similar see: Christie *Encyclopaedia* 585, Gloag 569, McBryde 593 with reference to Nordenfelt and Bridge v Deacons [1984] AC 705 at 713; Walker 183; The post Nordenfelt cases in Scotland almost always contained references to the case

> "It is a sufficient justification and indeed it is the only justification if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public".

The court based the test on reasonableness and two elements of this test were immediately distinguished. The restraint must be reasonable in the interest of the parties, and it must be (reasonable) in the interest of the public.

2.1. The Nordenfelt test today

It might be suggested that Lord Pearce in *Esso* [6] attempted to compress the doctrine into one broader public interest test, but this interpretation cannot be accepted [7]: He stated that:

> "There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interest of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?"

But the judge merely attempted to stress that public policy underlies both requirements. He did not attempt to fuse them into one test. He still placed considerable emphasis on the reasonableness test despite some contrary dicta [8]. The purport of the dictum of Lord Pearce is merely that the close connection between the reasonableness and the public interest test as well as the affinity between reasonableness and public policy in general must be closely observed [9]. That the statement should be so interpreted is illustrated by *Rhodesian Milling* [10]. Goldin J stated:

> "It is always necessary to determine - and the said aspects are only means and relevant factors of testing this - whether the restrictions exceed what is reasonably

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see e.g: Meikle v Meikle (1895) 3 SLT 204, British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67, Mulvein v Murray 1908 SC 528 at 531-532; The Nordenfelt case was also mentioned in some early South African cases e.g. Empire Theatres Co Ltd v Lamor 1910 WLD 289 at 291.

6. Esso 324.

7. See Cheshire Fifoot and Furmston 404, Treitel 420, McBryde 593, Schoombee 141, The dictum was also quoted without comment in Letinvest plc v The Victor Tramway Ltd 1994 SCLR 164 at 165; Heydon *McGill* 343 interpreted the court in Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 1 ALR 385 as making this point but his interpretation cannot be accepted infra.

8. See Esso 329-330 see the discussion and criticism of the reasonableness approach of Lord Pearce; This is also how: Nelson 45, Rautenbach & Reinecke 557 understood it.

9. Although it is not clear the same point is apparently made by Cheshire Fifoot and Furmston 404 who state that it is a revitalisation of the approach of the Court of the Exchequer in the 19th century with reference to Mallan v May (1843) 11 M & W 653 at 665, Schoombee 141 also gave a more limited interpretation to this dictum.

10. Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 442.

> necessary for the protection of the parties and are consistent with the interests of the public. As the whole doctrine of restraint of the trade is based on public policy, the one question is, as was said above, is it in the interests of the community that a restraint should, as between the parties, be held to be reasonable and enforceable?".

Moreover, this view can be rejected in so far as it was accepted by the court. Heydon [11] suggested that the reasonableness and public interest elements would still have to be distinguished because the onus will be different with regard to the two elements. But this argument begs the question. There are much more important methodological reasons for maintaining the distinction. It will be apparent from Chapter 2 that difficult restraint questions cannot simply be answered by such a wide test. The two questions look at the problems here from different but separately important angles [12].

Reasonableness is at the core of the English and Scots doctrines of restraint of trade, but some questions hang over the South African doctrine. In South Africa a test similar to that in the other systems was followed [13] until the Appeal Court in the 1984 decision of *Magna Alloys* threw the substantive restraint of trade law into disarray [14]. The court emphasised that the doctrine was based on public interest [15], and many of the orthodox elements regarding restraints of trade in the courts were rejected [16]. However, one of the biggest difficulties with the case is that Rabie CJ did not take a specific stand on changes to the substantive restraint of trade doctrine.

South African law still displays a need for more specific tests to allow for the discounting of the broad principles of public policy [17]. But what will that more specific test (or tests) be? Will the courts in South Africa now depart from the *Nordenfelt* test as developed in English law?

In *Magna Alloys* the court accepted that reasonableness would play a role in determining public policy in restraint of trade cases [18]. A restraint would, according to Rabie CJ, probably be against

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11. Heydon *McGill* 343; McBryde 593 although he referred to the difficult dictum of Lord Pearce in Esso see supra.
12. Infra 9.
13. Ch 2 supra.
14. Christie 432 went as far as saying that the courts simplified the law of restraint of trade in Magna Alloys and the cases that preceded it. It is doubtful whether the Magna Alloys approach truly constituted simplification; Schoombee especially 130 and 151; Christie 433 said that some of the old learning will survive "like nuggets in a reef" but he is vague on this; Cf Kahn 398 merely suggested that it was not necessary to follow English law in all respects although he was unspecific on what the rules would be.
15. Supra 3.3.
16. Infra Ch 11-14.
17. Supra 3.3.
18. Magna Alloys 894 and 898; Cf Didcott J in Roffey v Catterall Edwards & Goudrè (Pty) Ltd 1977 (4) SA 494 (N) 503-504 was sceptical of the reasonableness issue because there is no historical justification for it. He merely assumed that it will still be part of South African law. This is open to doubt, See the criticism National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1099, Nathan 37 and Schoombee 132 contended that Roffey

the public interest if it was unreasonable. But it is problematic to determine what further factors will now be relevant in determining legality and it is unclear how reasonableness will relate to other factors that determine illegality in South Africa [19].

Schoombee [20] stated that the traditional two-tier test would now be replaced by a monolith. He contended that the court suggested some factors beyond reasonableness which will now be relevant in determining legality, and he struggled to determine what these mystery factors may be. But in the end he also came up with nothing new. He only mentioned factors that may be accommodated by the reasonableness test, and made reference to the broad public interest requirement which exists in all three legal systems anyway.

Van der Merwe [21] also tried to show how the old ideas will now be replaced by the *Magna Alloys* test, but his attempts only throw up the same types of issues that will form part of the second leg public interest requirement in England and Scotland and in pre-*Magna Alloys* South Africa [22].

It seems that courts after *Magna Alloys* have not fundamentally changed the *Nordenfelt* test in South Africa. Reasonableness will still be central to the doctrine in the same way as in England and Scotland. Public interest will still only be relevant as a second determinant of legality. The only consequence of the *Magna Alloys* case will probably be that some change of emphasis will take place, and that the importance of traditional public interest factors will be slightly enhanced, but this constitutes no real departure from the position in other legal systems under discussion [23].

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still accepted the reasonableness test; J Louw & Co (Pty) Ltd v Richter 1987 (2) SA 237 (N) 243 where this was accepted but where the point was also not taken further; Book v Davidson 1989 (1) SA 638 (ZS) 650 still shows that reasonableness will play an important role although the content of the test was not really relevant in this case infra Ch 11.3; Interest Computation Experts v Nel 1995 (1) SA 174 (T) 179; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 442; Schoombee 130, 134; Van Der Merwe 158 attempted to place less emphasis on the reasonableness requirement; Woker 332, But see 331 the court "moved the emphasis from reasonableness to one of public policy".

19. Schoombee 140.

20. Schoombee 130, 140; Cf also Woker 331-332 she emphasised that public interest will now be the yardstick. However she accepted that reasonableness was not abandoned. No suggestions regarding possible changes to the substantive test itself was made.

21. Van der Merwe LJ "Die funksie van die reels ten beskerming van die handelsvryheid" 1988 *TSAR* 252 at 266; See the discussion of the aspects mentioned here infra Ch 10.6.

22. Kerr *Tribute* 195 did not accept this view although the issues mentioned by him cannot necessarily be dealt with in terms of the reasonableness requirement see infra Ch 10.6.

23. See the latest cases infra 4.

3. Reasonableness inter partes and public policy

It was established in previous chapters that public policy forms the basis of the restraint of trade doctrine, and it should accordingly also lie at the root of the reasonableness inter partes test. But this is not always clear from the authorities. In some cases this test has been emphasised to such an extent that the public policy basis of the restraint of trade doctrine has been overlooked or, at the least, terminology has been used which might create this impression [24]. However, in most cases [25], notably again in the South African law in *Magna Alloys* [26], and in cases that followed it, courts have accepted that the reasonableness test is an expression of public policy. It has been acknowledged that contracts cannot generally be avoided on the basis of general reasonableness [27], and that restraints of trade concern a special type of reasonableness [28]. Courts have accordingly accepted that there is a wider milieu within which reasonableness exists. But they have not really analysed the theoretical basis upon which the application of the reasonableness inter partes test can be accommodated as an expression of public policy.

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[24]. Horner v Graves (1831) 7 Bing 735 at 743; Nordenfelt 561 and the discussion of the judgment of Lindley LJ, 566; Everton v Longmore (1899) 15 TLR 356; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 308, 309; Herbert Morris 708 although there are various other dicta in the case where the court clearly stated that both legs are stooped in public policy; Dickson v Jones [1939] 3 All ER 182 at 187; Atiyah 345-346 who assimilated the importance of the reasonableness requirement with the promotion of fairness in contracts as opposed to public interest; Hickling 35-36 to some extent made a connection but some elements of his discussion also seem unacceptable; Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1112.

[25]. Mallan v May (1843) 11 M & W 653 at 665; Leather Cloth Co v Lorsont (1869) 9 LR 354; Nordenfelt 565, 566; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 451; Mills v Dunham [1891] 1 Ch 576 at 589; Cf the exchange between the bench and counsel in Phillips v Stevens (1899) 15 TLR 325 at 325. The court tried to effect a clear separation between the interests of the individual and the public. However, counsel clearly made the point that they might coincide; Tivoli Manchester Ltd v Colley (1904) 20 TLR 437 at 438; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 766, 768, 771; See the criticism in Mason 738, 740 of Tallis v Tallis (1853) 1 E & B 391; McEllistrim 592; Esso 304, 318, 324 should be interpreted as supporting this point see supra Ch 2.1, 332, 341; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 827 and 828; Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 492; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 328-329; Anson 325; Collinge 410, 423; Heydon 25, 270ff although the point was not made clearly; Nelson 45; Sales 615; Treitel 410; Heydon *McGill* 344; Pieterse v Cilliers 1945 (2) PH A.31 53 at 54; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 333; Schoombee 132 in the discussion of National Chemsearch and Roffey; Heydon *McGill* 343 criticised the court in Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 1 ALR 385 for saying that the different aspects of the doctrine overlap but he placed a too wide interpretation on the dictum of Stephen J. The judge apparently only wanted to make this point; See supra Ch 3.

[26]. See especially Magna Alloys 894, 887-888 and the discussion of Esso although the reference to Lord Morris here is actually to the judgment of Lord Hodson; This was accepted Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 500 (Stegmann J fully quoted his judgment in Thorpe Timber Co (Pty) Ltd v CJ Griffin (unrep) and all references to Sibex 498-506 also refer to this case).

[27]. Middleton v Brown (1878) 47 LJCh 411 discussed Heydon 166-167; Esso 295, 298; Collinge 410; McBryde 590; McCullough & Whitehead v Whiteaway & Co 1914 AD 599 at 625; Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 438 and 443 although the misunderstanding between bench and bar 443 is probably caused by different use of the word public interest; Magna Alloys 893; Basson v Chilwan 1993 (3) SA 742 (A) 762; Van der Merwe 152 with reference to CFC van der Walt "Die Huidige Posisie in die Suid-Afrikaanse Reg met betrekking tot Onbillike Bedinge" 1986 *SALJ* probably at 654-655.

[28]. Herbert Morris 698; Cronin & Grime 51.

At first sight the notion that the reasonableness inter partes test is an expression of public policy seems to constitute a mixing of concepts that are theoretically incompatible [29]. Public policy and private interest have, in classical contract law, often been contrasted. In the heyday of laissez-faire economics, courts could interfere with contracts on the basis of public policy but contracting parties were regarded as the best judges of their own interests. Private interests were not perceived as being subject to judicial control, but the courts still accepted that they were the custodians of public interest in litigation between individuals.

However, a certain interest is not excluded from the domain of public policy merely because it can also be described as an interest of an individual. The only reason why all individual interests are not public interests is because there is, in many cases, no direct perceivable link between such interests and the interests of the public at large. Public policy is a generic term for a set of values that has particular importance for the public. Individual interests may also have such a public dimension [30]. Here "the interests of the parties are simply a particular facet of the interest of the public and generally the most important facet [31]".

Some examples to support this argument can be given:

- In *Nagle* [32] a woman was refused permission to register as a trainer of horses merely because she was female. The court found that a practice in terms whereof the Jockey Club had acted was discriminatory and contrary to public policy. It was the individual interests of the woman trainer that were in issue, but her private interests had a public policy dimension because her interests had been infringed in a discriminatory manner.
- In *Horwood* [33] a contractual clause interfered radically with personal freedom and such interference was also regarded as being contrary to the interest of the public. Some dicta tried to show that there was more direct interference with the public interest, but it was also acknowledged that the interference with the interests of the individual was itself contrary to the interests of the public.

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29. McBryde 590 who accepted that there is something anomalous here; McBryde *Thesis* 135ff. Under influence of the utilitarians most Scots lawyers made a clear distinction between utility and public policy factors on the one hand and equity or justice factors on the other; Otto 210-211 seems to think that these concepts are incompatible but he does not take a correct view of the principles that underlie the doctrine, LF van Huysteen and Schalk van der Merwe "Good Faith in Contract: Proper Behaviour amidst Changing Circumstances" (1990) *Stellenbosch Law Review* 248 do not seem to properly relate reasonableness here to public policy although their general thesis regarding the distinction between public policy and private interests can be supported.

30. Van der Merwe 140-141, 144.

31. Petrofina (Great Britain) Ltd v Martin [1966] 1 All ER 126 138 see also 139.

32. Nagle v Feilden [1966] 2 WLR 1027.

33. Horwood v Millar's Timber and Trading Company Ltd [1917] 1 KB 305.

The same can be said of the reasonableness requirement in restraints of trade cases. Work - and the protection of work - is a public policy value. It has implications that go far beyond the interests of an individual but, ultimately, the public policy infringement most frequently manifests itself in an unreasonable interference with the work of an individual [34]. Reasonableness here is a public policy factor [35].

The reasonableness inter partes test is accordingly also utilised in an attempt to balance freedom of trade and sanctity of contract. The judgment of Nienaber J in *Basson* [36] is unacceptable in so far as it suggests that the principles to be balanced differ depending on whether reasonableness or public interest is determined. Perhaps certain aspects of freedom of work are particularly emphasised when it comes to reasonableness inter partes, but the principle will equally form the basis of both the reasonableness and public interest legs of the restraint of trade test.

3.1. Reasonableness in restraint of trade cases and a wider concept of public policy unconscionability

It may be that the rigid distinction between public and individual interests is further breaking down. Courts will perhaps accept that clearly unfair contracts will not be maintained. No final opinion is ventured on this point because it is not necessary to answer it for the purpose of the restraint of trade doctrine. But one important caveat will nevertheless have to be entered: it will be wrong to attempt to infer too much from the use of the reasonableness concept within the restraint of trade doctrine.

Kerr emphasised that the court in *Magna Alloys* confirmed a general power to refuse to enforce a contract on the basis of public policy, and observed that reasonableness played an important role within this test [37]. He suggested [38] that a public interest notion so constituted will be able to fill the lacuna left by the rejection of the exceptio and replicatio doli in the *Bank of Lisbon* case [39].

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34. Herbert Morris 699, 714, See 716; Cf contra Russel v Amalgamated Society of Carpenters & Joiners [1912] AC 421 at 435 where the judge seems to have taken the view that more than the interference with the freedom of trade of the individual was required, See the criticism in Ch 3 supra; Triplex Safety Glass Co v Scorah [1938] Ch 211 at 215 is too narrow; Cf Basson v Chilwan 1993 (3) SA 742 (A) 762, 767, 773 and the manner in which wider principles were related to reasonableness.

35. Rautenbach & Reinecke 556-557, 560-561.

36. Basson v Chilwan 1993 (3) SA 742 (A) 767, Rautenbach & Reinecke 555, but see 556-557 ibid where this connection is apparently made.

37. Kerr 477-478, 497-498, 500, 502, 503.

38. Kerr 490, 497-498, 500-503; Kerr *Tribute* 194 where he concluded that the powers provided in Magna Alloys show that actions on contract are actiones bona fidei.

39. Bank of Lisbon and South Africa (Ltd) v De Ornelas 1988 (3) SA 580 (A).

However, this is questionable. The authorities that he relied on do not support him. Reasonableness has a very particular meaning in restraint of trade cases. He took passages out of context [40]. Reasonableness is bound to certain specific public policy factors, and the court in *Magna Alloys* did not use the concept in a wider sense. The technical rules for the determination of reasonableness are specific. They will break down if applied outside the doctrine. Thus a different form of reasonableness will have to be applied for the purpose of unconscionability.

Magna Alloys may be helpful in that it established a general basis upon which courts can refuse to enforce contracts for public interest reasons [41]. But the final conclusion of Kerr cannot be deduced directly from the case itself.

4. The more specific aspects of the reasonableness inter partes test

The determination of reasonableness in restraint of trade cases is technical [42]. The technical rules and principles applicable in England and Scotland are quite similar [43]. However, it is difficult to determine to what extent these technical rules and principles still form part of South African law [44].

It is almost impossible to divine how the court interpreted reasonableness inter partes from the cursory references to its theoretical content in *Magna Alloys*.

> "Although the importance of the criterion of reasonableness was thus acknowledged it is unfortunate that the Appellate Division did not go further and analyse and rule upon the way in which our courts have over the years applied the test of reasonableness and have given it a definite content by coupling it with the protectable interests of the covenantee [45]."

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[40]. Kerr 478 relied on J Louw and Co (Pty) Ltd v Richter 1987 (2) SA 237 (N) 243. This case confirms the first part of his argument namely that the court will have a broad discretion to refuse to enforce contracts which it considers contrary to public interest. This is the part that Kerr *Tribute* 198 quotes. But the cases cannot be authority for anything wider. The court said "It is against public interest to enforce a covenant which is unreasonable" but it is clear that the judge meant "covenant in restraint of trade" where he used the word covenant.

[41]. Cf the more careful approach towards Magna Alloys in Van der Merwe 144, 152, 159-160, Schalk Van der Merwe & Gerhard Lubbe "Bona Fides and Public Policy in Contract" (1991) 2 *Stellenbosch Law Review* 96-97, Lubbe (1990) 13; Christie 418 did not even discuss Magna Alloys in his analysis of the interaction between fairness and public policy.

[42]. See especially the observations of Neville J in Dottridge Brothers (Ltd) v Crook (1907) 23 TLR 644 although many of his criticisms can however today be answered.

[43]. Infra Ch 6-9.

[44]. Many of the issues discussed by Schoombee 141 under the previous head should rather fall into this category.

[45]. Schoombee 138.

Rabie CJ only mentioned the extreme example where the restraint goes beyond any interests of the covenantee [46].

In its application of the doctrine, the court seems to envisage at least some change to the substantive *Nordenfelt* doctrine, even though the judgment remains obscure on exactly how far, or indeed where, the court intended to go. Yet an analysis of the treatment of the facts in *Magna Alloys* shows that the substantive restraint of trade doctrine is still very similar to its pre-*Magna Alloys* counterpart [47]. Christie [48] stated:

> "For over a century contracts in restraint of trade have been very much a part of South African business life, and have so often been examined by the courts that a wealth of detailed rules has emerged, many of which can survive the change of the underlying policy of the law".

The cases, with the exception of *Drewtons* [49], in which the court in *Magna Alloys* found encouragement for its approach, also followed the traditional approach with respect to the substantive doctrine [50]. Later cases confirmed that the more technical aspects of the English and Scottish substantive reasonableness tests are also still at the core of South African restraint of trade law [51]. Courts often quote the statement in *Magna Alloys* to the effect that restraints will probably be unenforceable if they are unreasonable and then determine reasonableness by means of the orthodox tests [52]. Recent cases confirm that vast chunks of the substantive *Nordenfelt* test still prevail.

- The clearest expression can be found in the lucid decision of Stegmann J in *Sibex* [53]. He stated that the question is:

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[46]. Magna Alloys 894; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 486.

[47]. Magna Alloys 898, See Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 501 per Stegmann he also emphasised the manner in which facts were considered in Magna Alloys.

[48]. Christie 433.

[49]. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 309 (C) 310 although Van den Heever J alternatively looked at the case in terms of the traditional rules and principles.

[50]. Schoombee 132; See the very clear point of Botha J in National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 406; Roffey v Catterall Edwards and Goudre (Pty) Ltd 1977 (4) SA 494 (N) but see supra 2.1.

[51]. BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 56; Kerr *Tribute* 196; Kerr 505; Christie 433; Cf also Harms J in Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 486ff stated that it is merely a question of fact but he still applied the substantive reasonableness test; Domanski 240 argued that the old cases on restraint of trade would now be "suspect" which implies considerable - and probably also substantive - departure from the old doctrine but he later accepted the approach of Stegmann J in the Sibex case; The views of Van der Merwe 158 are vague and unsatisfactory although not incompatible with this approach; Schoombee 151; Lubbe and Murray 258 cautiously accepted that the old interests test will still be important after Magna Alloys.

[52]. Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 687 but see the criticism Ch 8.3; Coin Sekerheidsgroep (Edms) Bpk Ltd v Kruger 1993 (3) SA 564 (T) 572 with reference to Sibex; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 540ff although it must be admitted that this was not the basis on which the issue was argued in front of the court.

[53]. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 493.

> "...how anyone ... is to set out proving ... that the public policy which requires him to be held bound to his contract is in a particular case to be overridden on the ground of facts establishing that that aspect of public policy has become unreasonable in the particular case and that some other aspect of public policy identified as "reasonableness" is, in the particular circumstances to be accorded a higher priority".

He then applied the substantive doctrine along orthodox lines but with due consideration to changes in other areas effected by *Magna Alloys* [54].

- In the latest pronouncements of the Appeal Court in *Basson* [55], Eksteen JA submitted that there could be no numerus clausus of circumstances that would establish reasonableness. But this view cannot be accepted and it was not followed by any of the other judges. Nienaber JA, whose judgment is theoretically preferable, stated that [56] "the considerations that are to be considered in judging enforceability of a clause remains essentially the same" (my translation). The judge then proposed a four-pronged test which in most respects coincides with the general methodology in the other legal systems under discussion [57].

Divergencies between the South African reasonableness test and the test in the other systems are subtle [58]. Although they cannot be ignored, they do not really justify a clear separation between South African law on the one hand and English and Scots law on the other.

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[54]. Especially 499ff.
[55]. Basson v Chilwan 1993 (3) SA 742 (A) 762.
[56]. Basson v Chilwan 1993 (3) SA 742 (A) 767, See 774; Rautenbach & Reinecke 555 where it is not expressly stated but where these principles are clearly followed.
[57]. But see the criticism infra Ch 9.12.
[58]. Christie 434 seems to take a similar view in the end; See infra Ch 9; See infra Ch 9.6.

Chapter 6

The interests of the covenantee

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1. The role of the interests of the covenantee

Interests have, for many years, been at the heart of the determination of reasonableness inter partes [1]. The covenantee must do no more than protect his interests with the restraint. A wider approach has been followed in cases where a restraint operates during work relationships. The courts have sometimes measured the effectiveness of these restraints by asking whether they are fair [2]. But this should not affect the test that applies to traditional restraints. These relationships have special features that do not apply in the traditional cases.

- There will be a very complex interaction of the interests of the parties because they will still stand in a relationship of work [3].
- These cases will seldom be decided on the basis that the covenantee has protectable proprietary interests. Commercial interest will mostly be the relevant factor and in the case of commercial interests the question whether the restraint is not unreasonable towards the covenantor will become more prominent [4].

Some of the earlier South African cases simply looked at the temporal and spatial scope of the clause without reference to interests [5], but the interests test also became firmly entrenched in South Africa before *Magna Alloys*. And although there was initially uncertainty about the future of this requirement after *Magna Alloys* [6], recent judgments have also confirmed that it will prevail in South Africa [7]. It has now become more or less settled that the point of departure in South African law will still be the protectable interests of the covenantee [8].

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1. The earliest English case is Horner v Graves (1831) 7 Bing 735 at 743; See the cases infra; Interests were probably first mentioned in Scotland in Bell Prin 1.40 see cases infra; Much emphasis was placed on other aspects but interests already played a considerable role in Edgcombe v Hodgson (1902) 19 SC 224 at 226, SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 368.
2. A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 623; Watson v Prager [1991] 1 WLR 726 at 747, 750; Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 165, 170 where fairness is mentioned; Zang Tumb Tuum Records Ltd v Johnson [1993] EMLR 61 at 66.
3. See the reluctance of the court in Gaumont-British Corp Ltd v Alexander [1936] 2 KB 1686 at 1692.
4. See Heydon *McGill* 340 and his discussion of Mobil Oil Australia Ltd v McKenzie [1972] VR 315 at 318. This case will probably be regarded as too narrow in the legal systems under discussion.
5. SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 369, Cf the more careful view 372; Gordon v Van Blerk 1927 TPD 770 at 775.
6. Schoombee 138 and especially 140.
7. The treatment of evidence in Magna Alloys shows that the interest test was still fundamental see Schoombee 140.
8. See the discussion of the latest South African cases infra; Christie 442; Van der Merwe 158 although the statement with regard to interests is too vague and although it is not clearly tied to the reasonableness test; Basson v Chilwan 1993 (3) SA 742 (A) 774 it is also mentioned that many other aspects will be relevant although many of the issues that he mentioned will have an important connection to the interest test; Fisher v Salon Mystique 1995 (2) SA 136 (O) 140.

The broad principle implies that a restraint may only be aimed at protecting the interests of the covenantee. However, the courts should not be influenced too strongly by formal company law divisions of group companies [9]. Courts should perhaps look at the practical rather than formal interests of the covenantee where a parent company attempts to protect its subsidiaries [10]. A pragmatic approach must be followed where business is carried on by many subsidiaries, and the one subsidiary also protects the interests of others, or the interests of the parent company [11]. The court should determine interests that can be protected by looking at the scope of business and the way in which different elements of business are inter-connected. Company law divisions will help to establish the lines that the courts have to draw, but cannot be conclusive.

A restraint will have to exist in support of an interest. Hence, in theory, only interests that will in time actually be protected by the restraint will be protectable. The interests test only makes sense if the temporal nexus between interest and restraint is maintained [12]. An interest cannot be

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[9]. Left open in Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 433.

[10]. Stenhouse Australia Ltd v Phillips [1974] AC 391 at 404 found it unnecessary to go into the concept of "group enterprise" because the business of the covenantor was to some extent handled by subsidiaries; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 383 although the court could have investigated the issue more deeply. The approach towards trade secrets of subsidiaries at 385 is more acceptable; See the comments Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 72; Hall Advertising Ltd v Woodward 1992 GWD 29-1686 noted that it was necessary that averments had to be made about the type of work that the employer did. The view of the court that actual facts will have to be shown is probably incorrect infra 13.

[11]. Continental Tyre and Rubber (GB) Co Ltd v Heath (1913) 29 TLR 308 where the relationship between different companies was not properly analysed; In Great Western & Metropolitan Dairies Ltd v Gibbs (1918) 34 TLR 344 it was common cause that a restraint of this nature was unenforceable; Although Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1482-1483, 1491 is not strictly relevant it concerned the question whether a covenantor could be restricted from working for subsidiaries of a competitor (see Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 453). It shows a less rigid view; Business Seating (Renovations) Ltd v Broad [1989] ICR 729 at 734 the arguments of the court are extremely cursory and not helpful although the decision is correct on the facts; It was not investigated in Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486-487. The court merely accepted that the company could only protect its own interests; Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 55. The reasons for the decision were not discussed. It would certainly be too wide to protect interests of all associate companies. See the difficult problems here 55-56; Chitty 1214 although this issue was not properly distinguished from the one in 15 infra; Heydon *McGill* 338-339 and McGuigan Investments Pty Ltd v Dalwood Vineyards Pty Ltd [1970] 1 NSWR 686; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 23 Lord Ross took a too narrow view and the First Division appears to be sceptical of it. It decided this case on another point, See Forte 22 and 23; Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 72 although it is perhaps too lenient in lifting the veil and ignoring legal personality on the facts; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 453 is too strict although correct on the facts. Especially the explanation of Group 4 is too simplistic, See MacQueen 342; WAC Ltd v Whillock 1990 SLT 213 at 220 left the question open in interim interdict proceedings; Cf Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71 it was not necessary for the judge to go into it; McBryde 606 was chary of such restraints but admitted that there should be circumstances where they can be admitted; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) the court still felt that the restraint was reasonable because it held that the covenantor would know information - because of his different positions - which justified protection.

[12]. The restraint in Mallan v May (1843) 11 M & W 653 was inter alia probably invalid for this reason; Mulvein v Murray 1908 SC 528 at 531, 532 where the court protested against a restraint that restricted trading in any area where any business was at some stage carried on by the covenantee; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT

protected merely because the covenantee at some stage had an interest that might have been protectable. Normally, in the types of cases under discussion here, that will be an interest of the covenantee that is contemporaneous with the period during which the restraint is effective.

Yet contemporaneity will not necessarily be required. One possible quasi-exception to the principle can be mentioned with reference to artist restrictions [13]. Here a performing artist is restricted from working in a particular area for a period before and after working for a certain theatre in order to enhance his value while in the service of the covenantee. Here the aim of the restraint is to protect an interest which does not, in time, coincide with the restraint. The interest will exist during the period of employment although the restraint will operate before and afterwards [14]. But the restraint is still directly connected to the interest.

Moreover, other aspects of the doctrine in England and Scotland will complicate this otherwise simple matter. The courts in these legal systems have not actually asked whether an interest exists contemporaneously with the restrictive period. In both these legal systems the reasonableness of a restraint has been determined from the point of conclusion of the restraint [15]. That an interest does not actually exist any more when a restraint comes into effect will be ignored by the court if it was reasonably foreseeable at conclusion of the contract that the interest would still prevail at such time.

The restraint should be valid if it provided for reasonably foreseeable expansion [16]. Expansion will be protectable as long as it was foreseeable that such expansion would take place before the

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450 at 451 although this point was not clearly distinguished from other issues; NCH (UK) Ltd v Mair 1994 GWD 34-1986 where the court refused an interdict that could restrict a covenantor from dealing in products dealt in by the covenantee during employment but which they could have ceased dealing in.

13. Tivoli Manchester Ltd v Colley (1904) 20 TLR 437; Empire Theatres Co Ltd v Lamor 1910 WLD 289; African Theatres Ltd v D'Oliviera 1927 WLD 122; See infra 7.1.4.3.

14. The position with actors in films may be more difficult. See with reference to Higgs (Inspector of Taxes) v Olivier [1951] Ch 899, [1952] Ch 311 by Treitel 405.

15. Infra Ch 13.

16. Proctor v Sargent (1840) 2 Man & G 20 and the question asked by Tindall CJ during the trial 25; Middleton v Brown (1878) 47 LJCh 411 at 412-413; It was not necessary to decide this in Bromley v Smith [1909] 2 KB 235; Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 367-368, 368-369 although the wide approach here will probably not be accepted today. The conclusion of Cozens-Hardy 370 seems more acceptable although his argument also displays some unacceptable features; Cf Vandervell Products Ltd v McLeod [1957] RPC 185 the restraint was unreasonable because future competitors at which the restraint was aimed was unrelated to the trade secret protectable vis-à-vis the competitor, See 191-192, 195 and 196; The argument on the provision of a customer list Gilford Motor Co Ltd v Horne [1933] Ch 935 at 967 is too narrow; Spencer v Marchington [1988] IRLR 392 at 394 it is unclear why restraint against dealing with customers would have to be limited to existing customers, Cf also 395-396 where reasonableness was determined with too much hindsight; Heydon 143, 145-146.

restraint terminated [17]. It will be of little significance that such expansion has not actually taken place.

In South Africa the court will look at the issue from the moment when it is asked to enforce the restraint. Courts will therefore be nearer to the actual position between the parties. They will sometimes be able realistically to determine whether a protectable interest will exist during the period of restraint [18]. However, the restraint will mostly still have to run for a period that follows the litigation, and this prospective element may again cause a discrepancy between the actual interests and the interests that the court can protect.

Finally, the court should determine interests objectively as it is dealing with public policy. In South Africa reasonableness is determined from the time at which the court is asked to enforce the restraint, and this may mean that the interest which the parties intended to protect may be different from the one that exists when the restraint is enforced; but this cannot influence reasonableness. The court in *Sibex* [19] tried too hard to separate the different aspects. A restraint will still be acceptable if it is too wide for the protection of the interest intended but reasonable for the protection of another unrelated legitimate interest .

2. Development of legitimate interests

The covenantee may not in the widest sense, restrict someone where such a restriction exceeds any interest of his [20]. But courts have also accepted that not all interests of the covenantee are protectable. Only legitimate interests can be the subject of an effective restraint of trade [21].

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[17]. See infra 4.3.

[18]. Amalgamated Retail Ltd v Spark 1991 (2) SA 143 (SEC) 150 although this was a franchise restraint: The court held that it would have made a difference if the covenantee seriously intended to compete with the covenantor in future see *Annual Survey* (1991) 46ff.

[19]. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488 cannot be accepted on this point, *Annual Survey* (1991) 49; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 573; Cf Basson v Chilwan 1993 (3) SA 742 (A) 770 and explicit contractual reliance on certain interests; Malden Timber Ltd v McLeish 1992 SLT 727 at 731 at 733 and see the problems with the subjective position here, See infra 8.1.

[20]. SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413; Goldsoll v Goldman [1915] 1 Ch 292; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390; Great Western and Metropolitan Dairies Ltd v Gibbs (1918) 34 TLR 344; Empire Meat Co Ltd v Patrick [1939] 2 All ER 85; Dickson v Jones [1939] 3 All ER 182 at 189 apparently confused restraints against competition and restraints that are wider than any interest of the covenantee; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 281; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227; Commercial Plastics Ltd v Vincent [1965] 1 QB 623; Chitty 1213 called such covenants "naked" but this phrase is normally differently used; Heydon 145; Lindley 10-180 although the cases mentioned mostly fall in the categories mentioned below; Dallas McMillan v Simpson 1989 SLT 454 at 456-457 did not properly observe the distinction; Katz v Efthimiou 1948 (4) SA 603 (O); Ex Parte Spring 1951 (3) SA 475 (C) especially 481; Cowan v Pomeroy 1952 (3) SA 645 (C) 651-652; See the arguments of the court in Kin v Sharneck 1959 (3) SA 534 (E) notably 536; Filmer v Van Straaten 1965 (2) SA 575 (W) specifically 580; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325

The interest test developed in the 19th century in England, but the courts initially took a wide view of such interests [22], and this continued into the 20th century [23]. However, the courts gradually became more cautious [24], and this culminated with *Mason* and *Herbert Morris* in the current notion that only legitimate interests could be protected [25].

A wider view of interests was also initially followed in Scotland [26]. However, the notion that not just any interest could be protected was recognised by Bell. He stated [27]: "Obligations in

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(W); Magna Alloys 894 still saw such restraints as clearly unreasonable. See Bonnet v Schofield 1989 (2) SA 156 (D) 158; Coin Sekerheidsgroep (Edms) Bpk Ltd v Kruger 1993 (3) SA 564 (T); Kerr 510; The importance of this distinction will become apparent later See the criticism of Heydon 263 infra 2; See infra Ch 9.12.

[21]. Cf the distinction Heydon 261, 263-264 it is fundamentally correct although some of the more specific elements are open to criticism. They will be discussed where relevant.

[22]. Horner v Graves (1831) 7 Bing 735 at 743; Whittaker v Howe (1841) 3 Beav 383; Hitchcock v Coker (1837) 6 Ad & E 438 at 454; Ward v Byrne (1839) 5 M & W 548 at 560, 561; Proctor v Sargent (1840) 2 Man & G 20 at 32-33, 34, 36; Rannie v Irvine (1844) 7 Man & G 969 at 977; Mallan v May (1843) 11 M & W 653 at 667; Tallis v Tallis (1853) 1 E & B 391 at 411 but see the criticism infra Ch 8.3; Avery v Langford (1854) 1 Kay 663 at 664-665; Allsopp v Wheatcroft (1873) LR 15 Eq 59; Wolmerhausen v O'Connor (1877) 36 LT 921 at 922; Rousillon v Rousillon (1880) 14 ChD 351 at 363-364; Nicoll v Beere (1885) 53 LT 659 at 660; Davies v Davies (1887) 36 ChD 359 at especially 368, 396; Baines v Geary (1887) 35 ChD 154 at 156; Mills v Dunham [1891] 1 Ch 576 at 587, 589; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 451; Perls v Saalfeld [1892] 2 Ch 149 at 151-152, 154, 156; Davies Turner & Co v Lowen (1891) 64 LT 655 at 655 where the court talked of interests although it only considered the interests of the covenantee and where the court suggested that this should be related to the reasonableness questions of space and duration; Rogers v Maddocks [1892] 3 Ch 346 at 355, 357; Woods v Thornburn (1897) 41 Sol Jo 756; Nordenfelt 549, 555, 556, 558, 559, 565, 566; Dubowski & Sons v Goldstein [1896] 1 QB 478 at 482, 483 and 484ff although the wide notions expressed at 486 certainly do not apply today; Stride v Martin (1897) 77 LT 600; Hood and Moore's Store Ltd v Jones (1899) 81 LT 169; Isitt and Jenks v Ganson (1899) 43 Sol Jo 744; Notes (1888) 14 *LQR* 240; Kales 136; Heydon 263 is wrong in stating that interests in this sense has not traditionally been relevant; Trebilcock 15-29 takes it too far in saying that all cases were upheld.

[23]. Lyddon v Thomas (1901) 17 TLR 450; Delius v Muller (1901) 45 Sol Jo 737; Howard v Danner (1901) 17 TLR 548; British Mannesmann Tube Co Ltd v Phillips (1903) 48 Sol Jo 117; Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 365, 367, 368, 369, 370 although the view of the majority in the Court of Appeal would probably today be regarded as being too wide; Tivoli Manchester Ltd v Colley (1904) 20 TLR 437 at 438; Dowden & Pook Ltd v Pook [1904] 1 KB 45 at 52, 53, 55; Hooper & Ashby v Willis (1905) 21 TLR 691 at 692; Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 322 at 326, 328; Bromley v Smith [1909] 2 KB 235 at 240; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763, 766-767, 771, 772-773 although the court here already went one step further see infra, Morris & Co v Ryle (1910) 26 TLR 678; Continental Tyre and Rubber (Great Britain) Co Ltd v Heath (1913) 29 TLR 308; Cf the criticism of the interests test by Neville J in Dottridge Brothers (Ltd) v Crook (1907) 23 TLR 644 and his discussion of his earlier criticism in Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 189 at 194-195 the more refined legitimate interests test as discussed below will be able to deal with issues in a more satisfactorily manner, See also Henry Leetham infra 15, See the criticism of Neville J in Goldsoll v Goldman [1914] 2 Ch 603 discussed in *Jur Rev* (1915) 14.

[24]. It started to develop in cases like Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 768-769, 773-774 and Pearks (Ltd) v Cullen (1912) 28 TLR 371 at 372.

[25]. Herbert Morris and Mason see the references in the ensuing sections; The new development was clearly confirmed in: Eastes v Russ [1914] 1 Ch 468 at 490-491 and Ropeways Ltd v Hoyle (1919) 120 LT 538 at 542; See Jenkins v Reid [1948] 1 All ER 471 at 480 and the approach towards old authorities.

[26]. Meikle v Meikle (1895) 3 SLT 204; Stewart v Stewart (1899) 1 F 1158 at 1163 per the Lord Justice-Clerk although the emphasis was placed on other issues, This aspect was stressed by Lord Trayner 1169-1170, 1172;

restriction of the exercise of trade to particular districts, and for the protection by reasonable restraint of a *fair* interest, are good" (my italics). The courts in Scotland, albeit in a less refined form, also have some pre-*Mason* authority for the notion that only more narrow interests should be protected [28]. The legitimate interests notion as expressed in *Mason* was therefore also unambiguously accepted in Scotland [29]. Some interests have been regarded as legitimate, while protection of some other interests has not been allowed.

Woolman [30] argued that the Scottish courts do not look properly at legitimate interests, and some of the cases on which he relies provide some authority for this point. However, his analysis is too narrow. The importance of such interests in this system has only been clouded by the procedural aspects [31].

In South Africa the doctrine only became firmly established in the early 20th century. The legitimate interests test quickly became a feature of the doctrine [32], although there are some earlier cases where a wide approach towards interests was followed [33].

3. Legitimate interests in post-employment covenants

In England and Scotland courts have accepted that trade connections and trade secrets may be protected [34]. The same legitimate interests still play an important role in South Africa. *Magna Alloys* did not settle this point but a plethora of authorities has again entrenched the principle that these legitimate interests are pivotal to the reasonableness question:

Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1110-111, 1112, 1113 and 1115; Dumbarton Steamship Co Ltd v MacFarlane (1899) 1 F 993 at 996, 997; Mulvein v Murray 1908 SC 528 at 533, 534; Gloag 571 who accepted that a wider approach to interests was initially followed.

27. Bell Prin 1.40.

28. Berlitz School of Languages Ltd v Duchene (1903) 6F 181 at 186 where the view of the court of narrower interests can be criticised but where a clearly narrow view was taken of interests, Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1113-1114 and some typical Mason type of arguments can already be found in British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68.

29. Minimax Ltd v Geddes (1914) 31 ShCt Rep 36 at 39; Remington Typewriter Company v Sim (1915) 1 SLT 168; Taylor v Campbell 1926 SLT 260 at 261; Kennedy v Clark (1917) 33 ShCt Rep 136 at 139, 140; Gloag 571 thought that Scots law would so develop.

30. Woolman 253ff and especially 258.

31. Infra Ch 15.2.2, Ch 11.5.1.

32. Gordon v Van Blerk 1927 TPD 770 at 773; Estate Matthews v Redelinghuys 1927 WLD 307 at 312.

33. African Theatres Trust Ltd v Johnson 1921 CPD 25.

34. Atiyah 342 described both as nebulous concepts but some flesh can be placed on the skeletal notions; The third interest relating to working for competitors that Selwyn 385 mooted cannot be accepted.

- This was the view taken in two of the cases on which Rabie CJ in *Magna Alloys* relied for changing the law in South Africa [35].
- It is still the accepted position in most of the cases that follow *Magna Alloys* [36].

4. Trade and customer connections [37]

Not only customer but also wider trade connections [38] may be protected by restraints of trade. The emphasis here will however be on customer connections because most cases deal with such interests. Only cursory remarks will be made about wider connections.

Customer connections consist of two elements:

- They are covenantee-related. It will have to be shown that there is a connection between customer and the employer's business that can be protected [39]. Such connections will only be protectable if customers belong to the covenantee, with some exclusivity and continuity in the relationship.

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[35]. On the two important cases of National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) and Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N), See Schoombee 132, See supra Ch 2.3.1, Oosthuizen 383 also still stresses these aspects in the discussion of the cases mentioned here.

[36]. Both were again endorsed in the latest Appeal Court case in South Africa Basson v Chilwan 1993 (3) SA 742 (A) 770; See the cases infra these interests are still utilised as the cornerstone of reasonableness, But Cf 763 where the question was left open for cases of inequality of bargaining, See infra 4.5.

[37] For early expressions: Ward v Byrne (1839) 5 M & W 548 at 560, Proctor v Sargent (1840) 2 Man & G 20 at 34, 36, Sainter v Ferguson (1849) 7 CB 716 at 726 although it will not be applied in a similar manner today; Middleton v Brown (1878) 47 LJCh 411 at 413, Federal Insurance Corp of SA Ltd v Van Almelo (1908) 25 SC 940 at 944-945.

[38]. Herbert Morris 709, 710, 711; Bowler v Lovegrove [1921] 1 Ch 642 at 652; SW Strange Ltd v Mann [1965] 1 WLR 629 at 638, 639, 640; Francis Delzenne Ltd v Klee (1968) 112 Sol Jo 583; Marion White Ltd v Francis [1972] 3 All ER 857 at 862; Office Overload Ltd v Gunn [1977] FSR 39 at 44; Spencer v Marchington [1988] IRLR 392 at 395; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Atiyah 342; Davies 492; Gooderson 415; Heydon 108; Cheshire Fifoot and Furmston 409; Chitty 1206 used the phrases "trade connection" and "connections with customers as if they are synonyms"; Gurry 210; Taylor v Campbell 1926 SLT 260; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 150, 152-153, 157; Kilgour v McNicol 1961 SLT ShCt 8 at 9; Steiner v Breslin 1979 SLT (Notes) 34 at 35; Rentokil Ltd v Hampton 1982 SLT 422 at 422, 423; Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; Rentokil Ltd v Kramer 1986 SLT 114 at 116; Scotcoast Ltd v Halliday 1995 GWD 7-355, Scott Robinson 161; Walker 188; Gordon v Van Blerk 1927 TPD 770 at 775; Estate Matthews v Redelinghuys 1927 WLD 307; Thompson v Nortier 1931 OPD 147 at 152; Holmes v Goodall and Williams Ltd 1936 CPD 35 at 42; Aling and Streak v Olivier 1949 (1) SA 215 (T) 220; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 353; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 74, 75; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 67; Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 785; U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 144; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 307, 314; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 56; Basson v Chilwan 1993 (3) SA 742 (A); The Concept Factory v Heyl 1994 (2) SA 105 (T) 114; Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 511; Christie 444 but see the criticism infra 4.4; Rautenbach & Reinecke 555.

[39]. Kilgour v McNicol 1961 SLT ShCt 8 at 10 where the court was also prepared to some extent to protect recommendations but see the discussion of the protection of goodwill in these cases infra 11.

- They are also covenantor-related. Customer connections will only exist relative to a particular employee.

Especially covenantee related requirements must not be too strictly applied. Employers need protection of fragile customers. It is in such cases that protection will be significant, and a limited view of connections should not be taken [40].

4.1. The first covenantee-related issue: customers must belong to the employer

The courts will refuse to protect customer connections that were *only* created and maintained by the aptitude and skill of the employee [41], and they have often referred to the contribution of the covenantee [42]. But customer connections may still be protected even though the restraint interferes with the use by the employee of his personal skills and aptitude [43]. The covenantee can protect customer connections even if the covenantor has contributed substantially towards their establishment. The important reason for this was given in *Eastes* [44], where the court asked: "Would it not now be a great hardship upon the plaintiff if the defendant were to be permitted to take away the benefit of the connection which he has been paid to assist in building up?" Connections will only fall foul of this principle where the covenantor brought in former customers of his and continued serving them exclusively without much support by the employer [45]. The contribution of the employer in providing support may, even in cases where customers were

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[40]. John Michael Design plc v Cooke [1987] 2 All ER 332 at 334 and 335 on the granting of interdict but see the criticism of the case infra 4.3. Treitel 406; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401.

[41]. Bowler v Lovegrove [1921] 1 Ch 642 at 652-653 although other aspects were more important; Cf Oswald Hickson Collier & Co v Carter-Ruck [1984] 1 AC 720 where the parties excluded customers that were brought in by the covenantor from the workings of the clause; Heydon 111 the narrow approach discussed there with reference to American cases will probably not be followed in the jurisdictions under discussion here (The reference to Croft v Hawe (1836) Donnely 82 is dubious. At the most favourable the case very vaguely supports this contention but it was decided on a different basis see the discussion infra Ch 9.6); Marshall v NM Financial [1995] 1 WLR 1461; Heydon *McGill* 336; See also the comparison of Trebilcock 95ff; Cf some elements of this Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1115 although the court here was dealing with issues of consideration; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 75 although not properly investigated.

[42]. GFI Group Inc v Eaglestone [1994] FSR 535 at 538, 542; Cf Nachtsheim v Overath 1968 (2) SA 270 (C) 272, 273 although the court also emphasised that some customers existed before the covenantor became employed; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 69; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 542ff with reference to Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C) 69 although the Appeal Court incorrectly placed some emphasis on the improvement of personal skill by training; The duration of the employment may play an important role here: Cansa supra and M & S Drapers v Reynolds [1956] 3 All ER 814 at 820. Although it might be difficult to determine what the duration of the employment would be. In both these cases the employment had already run for some time when the restraint was concluded; Cf however Luck v Davenport-Smith [1977] EG 73 though the case is confusing.

[43]. Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 406.

[44]. Eastes v Russ [1914] 1 Ch 468 at 487; Cf Blake 654 relies on the agency principle. This may be too narrow.

[45]. M & S Drapers v Reynolds [1956] 3 All ER 814 especially at 818 and 820 per Morris LJ although he did not give a final opinion, 821 per Denning LJ, Discussed Gurry 215-216; Heydon 120.

brought in by the employee, be sufficient to ensure that a person also becomes his customer connection [46].

In *Biografic* [47] the court argued that a company which made advertising films did not establish customer connections with the advertising agencies that provided it with work [48]. Almost every production of a film went out on tender to advertising agencies and all producers could bid for the work. There was an added dimension in this case. The abilities of the individual in control of the business would also play a role in the decision of the advertising agency. But the court rejected the notion that this established a customer connection with the business. Davies J held that the personality of the director determined this relationship, and he therefore decided that it could not be a connection of the business. Yet such a reputation is established with the support of the business for which the employee worked. A relationship such as this could not be excluded from protection on the basis suggested by the judge.

In *Humphrys* [49] a business was acquired by the respondents (L). The appellant (H) had been employed in the business and was its mainstay. When the respondent acquired the business a new employment contract was entered into by the appellant. This new contract contained a restraint. The court decided that the respondent had no trade connections or established customers to protect. The customers were brought into the business by the appellant, and the restraint was therefore declared illegal. But courts have generally been more lenient towards employers. The appellant had merely been an employee, albeit an important one. The connections that an employee gains should, except in extraordinary cases, be regarded as the connections of the employer. In this case such interests should have been protectable against the appellant.

The business was sold to the respondents, and this probably played an important role in persuading the court to condemn the restraint. But that issue should have been irrelevant for the purpose of the contract with the covenantor, who was only an employee. The covenantee had, with the goodwill, also bought customer and trade connections even though these were built up by the appellant. It should then still be possible to restrict the appellant from stealing those customers because of the connections that he had built up with them during employment [50]. It should not

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[46]. Blake 664 although he showed that the principle has also been extended in some US jurisdictions; Hines 614ff on the basis of Louisiana cases will probably also be regarded as too wide for the purpose of the legal systems under discussion.

[47]. Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 345.

[48]. See infra Ch 7.2.3 on whether it was at all important to go into this question.

[49]. Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402ff.

[50]. The same criticism would apply in so far as the court accepted that there were trade secrets here although such secrets actually belonged to the covenantor see Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402-403.

influence the ability of the buyer to protect customers bought if no "customer goodwill" was created after renewal of the contract.

4.2. The second covenantee-related requirement: exclusivity and recurrence

Some exclusivity of relationship will have to exist [51], but it will not have to be total:

- In *Rawlins* [52] the court accepted that a connection could also exist where a customer historically traded with a certain number of businesses. The court accepted that this even enhanced the need for protection.
- Some customer connections may exist even in cases where work is done on a first come first served basis. It may perhaps also constitute a customer connection if the business has contacts which allow it to be informed of work before any other business [53]. The mere fact that an employee of a business that does on-line leak sealing lives near a business that utilises such services on a first come first served basis does not create a customer connection [54].
- In *Kemp* [55] the court argued that mandates to an estate agent were proprietary interests even if such mandates were not exclusive. There might be some room for also protecting mandates where they are only given to a few agents and where it depends on the particular identity of the business.

It has been stated that persons dealing with a business will have to conclude recurring transactions before they will constitute customer connections [56]. However, recurrence again cannot be an absolute requirement. The significance of recurrence should probably depend on the circumstances of the case. A customer connection will, in certain cases, also be established where only a singular

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51. Douglas Llambias Associates Ltd v Napier 1990 GWD 39-2243 although this issue did not come to the fore in other recruitment agency cases in Scotland; Snap-on-tools Ltd v McCluskey 1991 GWD 7-367 loyalty and exclusivity had to be averred; Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 513.

52. Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 544.

53. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 510 although the court found that it was not clear on the facts whether there were such advantages.

54. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488 is too careful.

55. Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 687, HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 4 but see the criticism infra 4.5; Bowler v Lovegrove [1921] 1 Ch 642 at 652 where the court took a more strict view of exclusivity although it was criticised infra.

56. Bowler v Lovegrove [1921] 1 Ch 642 at 652; Vincents of Reading v Fogden (1932) 48 TLR 613; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1423, 1426, Scorer was distinguished on this basis from Bowler although Danckwerts LJ 1425 criticised it on somewhat wider grounds; For examples see Heydon 110-111; In the influential exegesis by counsel in Malden Timber Ltd v McLeish 1992 SLT 727 at 731 "old established customers" are mentioned. This is perhaps too narrow, See similarly Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12; The court in CR Smith Glaziers (Dunfermline) Ltd v McKeag 1987 GWD 1-2; Cf also HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 3; Christie 444; See the film and theatre cases supra 1 and infra Ch 7.1.4.1.

transaction forms the basis of the relationship between the parties. The question will be a matter of degree to be determined on each set of facts [57]. The relationship will probably be protectable where the single transaction is fundamentally important and valuable and where the relationship will last for a considerable time [58]. Thus relationships based on one transaction may also sometimes be protected, although it will be important to limit protection to the duration of the single transaction [59].

4.3. Time at which customer will have to be tied to the business for the purpose of the covenantee-related requirements

Customer connection can only be protected during a particular period if the customers would have remained with the employer during the period of restraint but for the fact that the employee had left the service of the covenantee [60]. But this principle has not been followed through absolutely [61].

The courts in England and Scotland have been more sensitive to the interests of employers. That a person who was a customer, has ceased patronising the employer, does not in these systems necessarily exclude protection [62]:

- Reasonableness must be temporally determined from conclusion and if it was foreseeable at conclusion that customers would still exist during the enforcement period, then the connections may be protected [63].
- Not only existing customer connections, but for pragmatic reasons, the spes that customers will return will probably also be regarded as protectable. In *GW Plowman* [64] the court stated

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[57]. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 504-505 although the argument of counsel places too much emphasis on knowledge as opposed to connection see the criticism infra 4.5.

[58]. Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 687 accepted that a 3 month average relationship between a client who sells his home and an estate agent was sufficient although this case was probably on the border.

[59]. Recurrence would still be central in a case like Scorer v Seymour Jones [1966] 1 WLR 1419 where protection for a longer period was sought, Cf Lawrence LJ in Bowler v Lovegrove [1921] 1 Ch 642 at 654.

[60]. Especially John Michael Design plc v Cooke [1987] 2 All ER 332 at 334 and 335 on the granting of interdict but see the criticism of the case infra Ch 15.2.2.1, PSM International plc v Whitehouse [1992] IRLR 282 at 283 where the court was also prepared to grant and interdict although it would probably just be an issue of principle, See Treitel 406; Cf Rogers v Drury (1887) 57 LJCh 504 where the argument that patients would not go to the buyer of a business was rejected.

[61]. Heydon 155 with reference to Coote v Sproule (1929) 29 SRNSW 578 580 (NSWSC) and the analogous argument that should theoretically apply in non-solicitation cases.

[62]. The point was already made in Nicholls v Stretton (1843) 7 Beav 42 at 45.

[63]. See infra Ch 13; Cf Macintyre v MacRaild (1866) 4 M 571 the restraint of trade doctrine was not discussed. However, the fact that the employer could not receive the appointment anyway would probably not be conclusive on the grounds discussed here; Vermeulen v Smit 1946 TPD 219 at 222 although the court did not consider foreseeability.

[64]. GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13, See Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 57; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1232, 1234 and 1235; Heydon 153, 155;

> that customers who are customers at termination can still be protected as the hope that they will return cannot be abandoned. In *Rentokil v Kramer* [65] Lord Davidson stated with reference to *GW Plowman* that "proprietary interest is wide enough to cover persons who are no longer their customers but were customers at the beginning of the 2 years [that is when the restraint started to bite]".

Restraints of trade are often aimed at protecting customer connections most vulnerable to interference by the covenantor [66].

The South African courts have apparently followed a stricter view [67]. However, it is suggested that the pragmatism of English law should be heeded on this point. The first reason for taking a wide approach to these cases does not always apply in South Africa, but the second ground for the Anglo-Scottish approach should be sufficient.

However, the pragmatic exception must not be taken too far. A court will probably not protect connections with customers where it was foreseeable at conclusion - or in South Africa at the time at which the court is asked to enforce the restraint - that such customers would not return before the end of the restraint [68].

In *Home Counties* [69] the restraint was limited to customers who had been such during the last six months of employment. It was submitted for the covenantor that only customers who had patronised the business during the last month should be protectable. His counsel suggested that customers who left before this time would not revert back to the covenantee. However, the court rejected this argument on the basis of the pragmatic exception proposed in *GW Plowman* [70]. The covenantee would still have a hope that customers who had left during the last six months would return. But this case is quite extreme; the business here was the selling of milk by a roundsman. The court should not follow the *GW Plowman* principle slavishly in future.

Heydon *McGill* 346 the author limited these arguments to non-dealing restraints but they will be of wider application although they will practically be most important in this context.

65. Rentokil Ltd v Kramer 1986 SLT 114 at 116; McBryde 597

66. Supra 4.

67. Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) 862; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503.

68. Cf A Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A) 419 for a similar argument in the context of implied protection in goodwill cases.

69. Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227

70. Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 1232, 1234, 1235

Courts must moreover be careful in laying down cut-off points. Harman LJ in *GW Plowman* [71] stressed that "if a man was a customer at the beginning of the employment I do not see why hope should be abandoned of his becoming a customer again at the end of it". It is unclear why emphasis was here placed on termination. This might imply that there is no reason why further justification will be needed if customers leave the employer after termination of the employment. But such a conclusion would be unacceptable. In England, no restraint will be maintainable if it is foreseeable that a customer will not remain a customer of the employer for the whole of the duration of the restraint even if the relationship with that customer will only cease after termination of employment. The pragmatic exception must also protect the employer in cases where the customer leaves after employment of the covenantor has terminated, but before the restraint has run out.

4.4. The covenantor-related requirement: the relative aspect of a customer connection

The law does not allow protection of every customer of the employer [72]. In a broad sense the covenantee can protect his customers but in reality protection is much more limited. Mere knowledge that the covenantor is an employee of a business of which a particular person is a customer will not suffice [73]. It is a prerequisite for a customer connection that there must be contact between customer and employee [74]. The rejection of the contact requirement in *GW Plowman* [75] cannot be accepted.

But this requirement is not sufficient [76]. A special type of contact is required. Cheshire Fifoot and Furmston [77] state that customer connections will only be protectable where:

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71. GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13; Heydon 153; Heydon *McGill* 346.

72. British Workmen's and General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68 already stressed this; Cf Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1375 clause limited to "customers visited".

73. National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1110 placed too much emphasis on this; See infra 4.5.

74. Bowler v Lovegrove [1921] 1 Ch 642 at 652 although the clause failed on other grounds; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 966; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402 although it was combined with "influence"; Smith & Wood 139, 140 the closer the contact the easier it would be to justify the restraint; Selwyn 386; Thompson v Nortier 1931 OPD 147 at 153; Forman v Barnett 1941 WLD 54 at 61; See also David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 438, Kerr 511 where dealings were emphasised; See Basson v Chilwan 1993 (3) SA 742 (A) 764.

75. GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 12. The reliance on Gilford is too wide the latter case concerned the protection of customer information.

76. Ropeways Ltd v Hoyle (1919) 120 LT 538, Dickson v Jones [1939] 3 All ER 182 at 188 but see also it was further narrowed down infra, See also the qualification in Dickson; Marion White Ltd v Francis [1972] 3 All ER 857 at 862-863; Methven Simpson Ltd v Jones (1910) 2 SLT 14 at 15; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 154; Walker 188.

77. Cheshire Fifoot and Furmston 408; See also criticism Heydon 109; Nachtsheim v Overath 1968 (2) SA 270 (C) 272; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 444-445; Christie 444.

> "the nature of employment is such that customers will either learn to rely upon the skill or the judgement of the servant or will deal with him directly and personally to the virtual exclusion of the master with the result that he will probably gain their custom if he sets up business on his own account".

This statement again leans too strongly to the other side. The truth lies somewhere between these two views. Sufficient connection [78], intimacy [79], acquaintance [80], influence [81] and personal or business relations [82] will be required. Customer connections will only exist where the employee has influence over customers because of the employment which makes it possible to plunder them from his employer [83]. It will accordingly not be sufficient to show that customers will leave when the employee leaves; the covenantor must gain such influence that he will be able to take them

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78. Eastes v Russ [1914] 1 Ch 468 at 490; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 568-569, 572 where mere connection was not regarded as sufficient. But see the criticism infra 4.5; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 444-445.

79. Dewes v Fitch [1920] 2 Ch 159 164, 165; Lewin v Sanders 1937 SR 147 at 149.

80. It was already stressed before Mason: Proctor v Sargent (1840) 2 Man & G 20 at 34, Lewis and Lewis v Durnford (1907) 24 TLR 64; Herbert Morris 702, 710; Dewes v Fitch [1920] 2 Ch 159 at 165; Bowler v Lovegrove [1921] 1 Ch 642 at 651; Dickson v Jones [1939] 3 All ER 182 at 188; Chitty 1206; Mulvein v Murray 1908 SC 528 at 532 although it was not clearly distinguished from the protection of knowledge; Rogaly v Weingartz 1954 (3) SA 791 (D); Cheshire Fifoot and Furmston 408; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348-349; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 314 although the other aspects included and the rubric of trade connections are too wide, See 307 where the court correctly explained why the restraint in this case could also be extended to the family of customers; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258 but see further infra 4.5; It is sometimes mentioned that the covenantor would get to know customers: Gilford Motor Co Ltd v Horne [1933] Ch 935 at 964, Dickson v Jones [1939] 3 All ER 182 at 188, Financial Collection Agencies (UK) Ltd v Batey (1973) 117 Sol Jo 416. Some of the statements may however be differently interpreted see infra 4.5; Cf SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 37 was distinguished from SW Strange.

81. Herbert Morris 702, 709; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1426; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1228 although it was not clearly related to protectable interests; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402; Mainmet Holdings plc v Austin [1991] FSR 538 at 542; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425; Anson 322; Collinge 420; Treitel 404; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348-349; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 444-445.

82. Herbert Morris 702; Dewes v Fitch [1920] 2 Ch 159 at 170; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Spencer v Marchington [1988] IRLR 392 at 395; GFI Group Inc v Eaglestone [1994] FSR 535; Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C) 65 good relationships with customers were stressed on the facts although it was not properly central to the case; Nachtsheim v Overath 1968 (2) SA 270 (C) 272; Magna Alloys 905; Bonnet v Schofield 1989 (2) SA 156 (D) 159 close relationships were stressed by counsel although this was not really addressed by the court; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503; Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 785; Fisher v Salon Mystique 1995 (2) SA 136 (O) 141 where relationships with customers were perceived as a ground for protection although Van Coller J accepted that it could not be relied on here.

83. Ropeways Ltd v Hoyle (1919) 120 LT 538 at 543; Dickson v Jones [1939] 3 All ER 182 at 188; SW Strange Ltd v Mann [1965] 1 WLR 629 at 640-641; Heydon 108-109 called this the customer contact doctrine, Cf Blake 658; Cheshire Fifoot and Furmston 408; Collinge 420; Lewin v Sanders 1937 SR 147 at 153; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 541; The Concept Factory v Heyl 1994 (2) 105 (T) 114.

with him [84]. The true object of protection in these cases now emerges. The courts allow a restraint:

> "... against the unfair invasion of his [the covenantee's] connexions by a servant who has had the special opportunities of becoming acquainted with his clientele, and if the protection is no more than adequate for this purpose it is permitted by the law [85]".

Blake mentioned three factors which the court should look at when these issues are to be determined [86]:

- The frequency of the employee's contacts with customers and whether he is the only person who is in contact with customers.
- Locale of contact.
- Nature of functions performed by the covenantor.

In England and Scotland the covenantee may only protect the customers with whom the covenantor will foreseeably form such connections. In South Africa mostly only customers with whom the covenantor formed connections will constitute protectable interests. Finally, courts conceivably will go beyond the influence over actual customers. It will probably be sufficient if an employee only dealt with the customer at the canvassing stage, if some influence was already obtained over those potential customers [87]. Customers are sometimes won by an elaborate process of canvassing that requires investment of time and money. In such cases potential customers will be a very vulnerable potential asset of the covenantee. These customers may well be protected where a reasonably strong relationship has already been established between the covenantor and the prospective client, as such connections will be very valuable.

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[84]. Cf Steiner v Breslin 1979 SLT (Notes) 34 at 35 although the court here only discussed the issue in determining whether interim interdict should be granted and although many of the factors considered could not be allowed in terms of the doctrine. The court still felt that there was some possibility that customers could be enticed away.

[85]. Cheshire Fifoot and Furmston 408 with reference to Dewes v Fitch [1920] 2 Ch 159 at 181-182.

[86]. Blake 658ff; Heydon 109ff; Cf also the different aspects mentioned Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 541; Fisher v Salon Mystique 1995 (2) SA 136 (O) 141-142.

[87]. Gledhow Autoparts Ltd v Delaney [1965] 3 All ER 288 at 292 where it was not finally decided; Spencer v Marchington [1988] IRLR 392 at 396 was sceptical of this although the judge implies that some protection will be possible. These factors can perhaps play a broader role than the one that was proposed in this case; Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at 356 shows that there must at least be some clear and strong link between potential customers and business. Although the interpretation of Lord Grieve of the contract here was probably too narrow; In Aramark plc v Sommerville 1995 GWD 8-408 the court did not allow the protection of prospective customers at termination of employment because the covenantor would not necessarily have knowledge of such customers. The issue must however be approached with caution because the court did not deal with the customer connection issue here; McBryde 597; National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1109 where too wide a statement was probably made; Although the court was probably correct on the facts the blanket statement in Petre & Madco (Pty) Ltd v Sanderson-Kasner 1984 (3) SA 850 (W) 859 is too wide; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503 although it is also cautious.

4.5. Knowledge of the names or requirements of customers

The employee's knowledge of customers' personal affairs or requirements has been stressed as a customer connection issue in many cases [88]. But this practice cannot be accepted, though it is apparently supported by illustrious authority. The notion that this type of knowledge can be protected was in many cases juxtaposed with acquaintance as the basis upon which customers could be protected. The courts apparently believed that connections will also be open to abuse where such knowledge of customers has been acquired. Yet knowledge probably cannot be protected under this rubric if no relationship has been created. This knowledge can help to show that a protectable relationship of influence has developed between customer and employee [89]. It might show that influence over a customer has been gained, and that the customer might follow the employee when he leaves the employment of the covenantee. Yet the knowledge itself should not be protectable under this rubric. The jump cannot be made directly from knowledge to influence, and the cases should not be accepted in so far as they indicate that the relational aspect can be side-stepped.

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[88]. Mason 743; Eastes v Russ [1914] 1 Ch 468 at 490; Herbert Morris 709; Fitch v Dewes [1921] 2 AC 158 at 165 distinguished the protection of intimacies and knowledge and both were seemingly related to customer connections, See Routh v Jones [1947] 1 All ER 758 at 760-761, Cf Grigson v Kinsman 1921 NLR 172 at 175 where the court stated that "employers secrets" were protected in Fitch; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394-395 the judge started talking of "use of confidential information for ... attracting the custom of old customers" but then went on to refer to "special knowledge", 395; Putsman v Taylor [1927] 1 KB 637 at 641-643 where the protection of information was not expressly related to customer connections but the court talked of knowledge that would undermine goodwill; Routh v Jones [1947] 1 All ER 179 at 181, Routh v Jones [1947] 1 All ER 758 at 760-761; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1426; T Lucas & Co Ltd v Mitchell [1974] 1 Ch 129 at 135; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401; Lawrence David Ltd v Ashton [1989] ICR 123 at 134; Blake is also not consistently clear on this matter see 655, 670-671; Cheshire Fifoot and Furmston 408; Gurry 215; Heydon 113; Smith & Wood 139; Gordon v Van Blerk 1927 TPD 770 at 775-776; Estate Matthews v Redelinghuys 1927 WLD 307 at 314 approved Herbert Morris but see the discussion infra 5.7; Thompson v Nortier 1931 OPD 147 152-153; Holmes v Goodall and Williams Ltd 1936 CPD 35 see the argument of counsel and the court at 42; Lewin v Sanders 1937 SR 147 at 150; Rogaly v Weingartz 1954 (3) SA 791 (D) 792 and 793-794; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 3-4; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 500. The court accepted that the information was confidential and inaccessible but some aspects create the impression that its protection was discussed under this rubric; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 349, 353; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258; Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 687 where knowledge about mandates was not really distinguished from the mandates themselves; Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 784-785 with reference to Joubert *General Principles of Contract Law* 784.

[89]. For authorities that ascribed a more exact meaning to knowledge: SW Strange Ltd v Mann [1965] 1 WLR 629 640-641 on knowledge and confidential employment, Cheshire Fifoot and Furmston 408, Walker 188, Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 541; Cf infra 5.7.

That the employee had knowledge of customers' names and addresses should therefore be of no value here. The cases that have stressed this aspect [90] cannot be accepted. Such knowledge should only be protectable if it constitutes a trade secret [91].

Heydon [92] stated that information about customers is sometimes called trade secrets because courts will be more likely to protect trade secrets. However, this is untenable. The trade secret requirements are better suited to being a yardstick for the protection of information, and it is highly doubtful whether it will be easier to achieve protection under the trade secret rubric if the trade secret requirements are properly applied. The customer connection basis for the protection of influence over customers may to some extent have developed from the protection of knowledge [93], but it now stands on its own feet.

It will create a paradox if information itself is regarded as protectable here [94]. An example may be mentioned. (A) and (B) are exclusive customers of (X) Co. Their needs are generally known in the industry but they are still truly customers of (X). (Y), an employee of (X), does not deal with these customers, but he too knows this information about their needs. Can these customers be protected against (Y)? Is this information protectable under the customer connection rubric? It is difficult to see why information that is generally accessible should be protectable here. This type of information cannot be protected as such while other types of information have to meet the rigid requirements set for trade secrets [95].

Sibex [96], and the contentions put forward by counsel, vividly illustrate the problems that may arise if a proper niche is not provided for knowledge about customers. Counsel mentioned the problem of a field of business where customers are shared and their needs generally known. He stated that knowledge of the identity of customers, which he called "confidential information amounting to a form of property called trade connection", will not exist in such a case, and he submitted that the

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90. Putsman v Taylor [1927] 1 KB 637 at 641-642; Estate Matthews v Redelinghuys 1927 WLD 307 at 314 although it is not clear from the case whether the court allowed the protection of customer information as trade secrets, See infra 5.7; Holmes v Goodall and Williams Ltd 1936 CPD 35 see the argument of counsel and the court at 42; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 3-4; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 314, Christie 444, See the more acceptable judgment of Watermeyer JP.

91. Cf Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 572. This basis for protection was rejected on the facts as the information was generally known. But it is difficult to see how this information can contribute to creating customer connections even where it is not general. Cf also the confusion in the restraint clause in this case between the different concepts 573, See infra.

92. Heydon 108.

93. Blake 670.

94. Trebilcock 92.

95. Infra 5.7.

96. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503-505, Cf 487 Harms J saw customer lists as a trade secret this is more acceptable.

knowledge of customers' identity will merely constitute personal skill here [97]. The argument is correct in so far as it concludes that such knowledge is not protectable. But categorisation of the protection of knowledge under the customer connection rubric is problematic. The argument shows that knowledge has its own prerequisites before it can be protected; it has to meet the requirements of a trade secret. The determination of knowledge-related questions under the trade connection rubric merely draws attention away from the more important matter of connection.

The answer of Stegmann J [98] to the conundrum posed by counsel is only acceptable because he emphasised connection rather than knowledge (although it would have been even clearer if the judge had further distanced himself from these arguments). He mentioned that it will still be important to determine whether there is a special relationship - though not an exclusive one - with the customer, i.e. a relationship that will be valuable to a competitor. But the judge was also influenced by the awkward fusion of concepts made by counsel. He concluded that it may become difficult to distinguish trade secrets and customer connections [99] in a case where a special relationship is built up with a customer but it is not exclusive. However, the distinction is clear-cut. Connection can establish protection in such a case, although knowledge will probably not, because the latter will not comply with the requirements for a trade secret.

4.6. Confidential employment

The term "confidential employment" has mostly been used to describe the relationship between employee and employer [100]. Here confidential employment means employment relationships where some confidentiality exists between employer and employee. In such cases the concept of confidential employment will not really add anything to determining the reasonableness of restraints. It can only cause confusion in determining whether trade secrets or protectable trade connections exist. It must therefore be welcomed that its use has ceased in more recent restraint of trade cases.

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97. The argument is probably taken from Bowler v Lovegrove [1921] 1 Ch 642 at 652 at 651-653, 654 but it is subject to the same criticisms.

98. Sibex 505.

99. Sibex 505 whereupon the judge then declined to draw a distinction between these concepts.

100. Mumford v Gething (1859) 7 CBNS 305 at 319; Lewis and Lewis v Durnford (1907) 24 TLR 64; British Mannesmann Tube Co Ltd v Phillips (1903) 48 Sol Jo 117; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 768; Pearks (Ltd) v Cullen (1912) 28 TLR 371; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 392; Putsman v Taylor [1927] 1 KB 637 at 641-642 where the court accepted that all contracts are confidential but where it was stressed that the employment here was particularly confidential, Cf Vincents of Reading v Fogden (1932) 48 TLR 613; Dickson v Jones [1939] 3 All ER 182 at 188; Chitty 1207; Holmes v Goodall and Williams Ltd 1936 CPD 35 at 42; Estate Matthews v Redelinghuys 1927 WLD 307 at 314 contains elements of both this and the next point but the former dominates.

Some, albeit fewer, authorities have mentioned confidential or fiduciary relationships with customers [101]. This type of confidentiality will exist where employees enter relationships with customers that require discretion and secrecy, and will be important in determining whether customer connections exist. The court will provide emphatic protection where relationships between customers and employees are confidential [102].

4.7. Wider trade connections

Other trade connections are connections that a business has with organisations that allow it to have a competitive edge, and which are important assets of the business, for instance a connection with a particular supplier who gives special and, to some extent, exclusive privileges to the business. These connections have not really been properly analysed by the courts [103]. The latter form of trade connection has only started to develop as a protectable interest in recent times. However, the rules regarding customer connections will probably be extended by analogy to these cases. Some exclusivity and continuity will again be required. In *Ropeways Ltd* [104] the court noted that connections with a supplier cannot be protected if the supplier will supply to any person on similar terms [105].

5. Trade secrets [106]

The courts have recognised that a trade secret will constitute an interest on the basis of which an effective restraint of trade can be founded. There were harbingers [107], but this principle was established in *Herbert Morris* [108].

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[101]. Bridge v Deacons [1984] AC 705 at 719; Oswald Hickson Collier & Co v Carter-Ruck [1984] AC 720 at 723 and Edwards v Worboys [1984] AC 724 at 726; Scottish Farmers' Dairy Co (Glasgow) v McGhee 1933 SC 148 at 153; Christie *Encyclopaedia* 595 took a too narrow view of the extent to which customers can be protected; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 349; Basson v Chilwan 1993 (3) SA 742 (A) 774.

[102]. The problems that have occurred in Oswald Hickson Collier & Co v Carter-Ruck [1984] AC 720 at 723 have now been solved see infra Ch 10.5.2.

[103]. E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 307 was prepared to protect the covenantee against the covenantor's knowledge of suppliers and buyers of hay but it may be extended by analogy; Gilford Motor Co Ltd v Horne [1933] Ch 935 the restraint aimed at protecting "any other person that the business traded with" but the court did not discuss this as a separate aspect; Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 shows how important the protection of suppliers may be although secrets were in issue; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) the court should have gone to more trouble in determining to what extent suppliers could be protected as business connections.

[104]. Ropeways Ltd v Hoyle (1919) 120 LT 538.

[105]. HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 2, 4; Premier Medical & Industrial Equipment (Pty) Ltd v Winkler 1971 (3) SA 866 (W) 868 accepted that "customers" in a certain restraint clause would include suppliers; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 502, 503.

[106]. See infra 5.8.

Heydon stated that both trade secrets and know-how can be protected by restraint. He saw know-how as extending the information that could be guarded and he defined it roughly as knowledge of how to solve particular problems [109]. However, no consistent distinction between trade secrets and know-how has emerged [110]. Some courts have called unprotectable personal skill "know-how" [111]. Yet, know-how - if any specific meaning can be ascribed to the term - is, rather, a very specific form of trade secret [112]. It will accordingly be accepted here that information can only be protected if it constitutes a trade secret.

Trade secrets will be protected by an implied term against use and disclosure in a contract of employment. But they can, and will often, be guarded by express restraints of trade. The emphasis will here be placed on express restrictions for the protection of trade secrets. Yet many cases regarding implied protection, and even cases where no contract between the parties existed, will be referred to in the discussion of trade secrets. No full analysis of the distinction between the different types of protection will be made. Only the complex interaction between express and implied protection will be discussed in some detail [113].

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[107]. William Robinson & Co Ltd v Heuer [1898] 2 Ch 451 at 456-457; Haynes v Doman [1899] 2 Ch 13 at 23, 28-29; British Mannesmann Tube Co Ltd v Phillips (1903) 48 Sol Jo 117; Caribonum Co Ltd v Le Couch (1913) 109 LT 385 at 388 accepted on appeal 587; Mason 740 where the court distinguished Haynes v Doman on the basis that it concerned trade secrets; SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 370-371.

[108]. Herbert Morris 711-712.

[109]. Heydon 86, 101-103 relying on 1) Printers and Finishers Ltd v Holloway [1965] 1 WLR 1 although this case concerned the question of trade secrets and 2) Commercial Plastics Ltd v Vincent but see the discussion of the case infra 5.2.2; Heydon *McGill* 335; Treitel 404-405 stated that Pearson LJ in Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 642 "faintly hints at it" but the court included the protection of this information as confidential information; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 71; Schoombee 132, Domanski 229.

[110]. MacQueen *Stair Encyclopaedia* 1455 mentioned that know-how has now been defined in an EC Commission Regulation. This has now been replaced by the Technology Block Exemption 1995. The author described it as a mysterious concept and did not discuss its meaning relative to trade secrets.

[111]. Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 768-769; Stevenson Jordan and Harrison Ltd v Macdonald and Evans (1952) 1 TLR 101 at 104, See Heydon 102; Herbert Morris 711-712; Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 339; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 319; See Gurry 90-91; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 201.

[112]. Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 344; Potters-Ballotini Ltd v Weston-Baker [1977] RPC 202 at 206 is not clear; Turner 14ff; Blake 672; Davies 491; Heydon 102 accepted that know-how had at times been so understood; Whish *Stair Encyclopaedia* 1209; Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 190-191 described information which is protectable as a whole as know-how. See also the discussion on the facts 194-195, Cf 5.2.1; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 487, 494, 508-509; Knobel 489; Cf Kerr 511 regarded specialised marketing techniques as know-how; Trebilcock 84ff does not seem to take the issue much further.

[113]. Infra 5.6.

The three legal systems are discussed together. Scots law on this issue is closely intertwined with English law and there will be no difficulties in discussing these systems together [114]. However, there are foundational differences between South African and English law when it comes to wider protection of trade secrets [115]. English law cannot be slavishly applied in South Africa, but the courts have nonetheless accepted that the legal systems will be similar in many respects. In all three systems protection in employment cases will be based on an implied term in the contract [116].

Protection of trade secrets will depend on two main requirements. There must be a trade secret, and the covenantor must be in a position to undermine that trade secret as a result of the knowledge of it. The second requirement will be discussed first, as it is settled, quite uncomplicated, and some knowledge of it is necessary to facilitate an understanding of the type of trade secrets that can be protected.

5.1. Knowledge of trade secrets

Trade secrets cannot be protected against all activities by which they will be devalued. A restraint can only be based on a trade secret if the covenantor knows the secret. The covenantor may be restricted only in so far as he may diminish its value by disclosing it, or by exploiting his knowledge of it, and he may only be restricted from utilising the trade secret in so far as it is directly or indirectly derived from the employer [117].

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[114]. There was some initial reluctance see Exchange Telegraph Co Ltd v Guilianotti 1959 SLT 293 at 297; MacQueen *Stair Encyclopaedia* 1451; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40 accepted that the branch of law was not fully developed in Scotland. But a considerable amount has since been decided on this issue; Cf however infra 5.3, 5.7.

[115]. Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 190-191; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 427; Pistorius 330-331 and the cases mentioned there.

[116]. Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 190-191; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 427, 429-430; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 529; On the notion that information in employment cases is protected on the basis of contract in England: United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 167 stated that the basis of protection was not clear and accepted that the scope of the remedy would be the same whatever the basis, Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 135, Neill LJ rejected the view of counsel 134, Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 348.

[117]. It was already recognised in Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 768, 774; Stuart and Simpson v Halstead (1911) 55 Sol Jo 598; Caribonum Co Ltd v Le Couch (1913) 109 LT 385, 388 where this issue was regarded as fundamental; Mason 731, 733, 740, 741; Herbert Morris 702-703, 709, 710, 711, 712, 717; Millers Ltd v Steedman (1915) 31 TLR 413 at 416; Ropeways Ltd v Hoyle (1919) 120 LT 538 at 542, 544; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390; For this reason standard clauses that apply to all or a large group of employees may be problematic see Vandervell Products Ltd v McLeod [1957] RPC 185 at 192; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 640-643; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1480, 1485, 1486; Spencer v Marchington [1988] IRLR 392 at 395; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 452, 426, 433, 435; Cheshire Fifoot and Furmston 407-408; Farwell 67; It is however not necessary to show that the covenantor would disclose the trade secret: Heydon 101 with reference to Farwell 68; Treitel 404; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 22, 28; Cf also SOS Bureau Ltd Payne 1982 SLT ShCt 33 at 37; SOS

The only qualification will be on the basis of the principle regarding the time at which reasonableness should be determined. In England and Scotland a restraint for the protection of a trade secret will be allowed if it was foreseeable, at conclusion, that it would come to the knowledge of the employee even though the de facto position may be different [118].

5.2. Features of trade secrets

It is difficult to delineate trade secrets [119]. They are notorious for being very difficult to define, both on the facts [120] of a case and in law [121].

5.2.1. Accessibility/ Confidentiality

Bureau Ltd v Payne 1982 SLT ShCt 33 at 36; A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299; Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 73; Malden Timber Ltd v McLeish 1992 SLT 727 at 735; Aramark plc v Sommerville 1995 GWD 8-408; Ex Parte Spring 1951 (3) SA 475 (C) though the protection of knowledge in this case was not clearly related to trade secrets; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 73, 74, 76; U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 144 although this was a franchise case; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 500-501; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 362 although there are problems with the approach to knowledge for other reasons supra 4.5; Madoo (Pty) Ltd v Wallace 1979 (2) SA 957 (T) 958 but see infra 5.7; National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1103, 1105; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 308 the shortness of the restraint would not influence the protection of interests because the covenantor would immediately obtain information about customers (although the information issue was not clearly related to trade secrets); Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 436; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 487, 494-495; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57-58 said that the mere fact that the covenantor contended that he did not remember the secret will not be enough. It is true that a bare allegation will not suffice. But the restraint will not be acceptable where it is clear that the covenantor did not carry it away in his head or otherwise; Basson v Chilwan 1993 (3) SA 742 (A) 760; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57-58; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 443 and the reference to the unreported Yanasak case, see counsel 443.

[118]. Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 449; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1485; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36; The pre-Magna Alloys position was similar in South Africa: Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 613, Christie 444 is wrong in still holding this view in post-Magna Alloys South African law.

[119]. Blake 667ff and the problems in the modern world; See except for the cases below: Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12, Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Basson v Chilwan 1993 (3) SA 742 (A) 760, 764, 769, 774; Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402.

[120]. McBryde 598; For the determination of whether a trade secret exists on difficult facts see e.g. Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 641ff.

[121]. The courts have not finally decided when information can be protected as trade secrets see Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 209; Turner 120; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 335; Domanski 230.

Primarily, information must be secret or confidential. It is difficult to determine this because the courts will not merely protect information that is only known to the parties. Information does not have to be privy only to the covenantee. Both absolute and relatively secret information will be protectable [122].

Courts have determined confidentiality by discerning the accessibility of information to parties to whom it is not disclosed by the holder. Hence information that is known to the public cannot be protected [123]. In *Spencer* [124] the court again held that certain information could not be protected because it would be provided on request to any member of the public who asked.

Almost any information can be independently discerned by third parties if they are prepared to devote enough time and resources to it. Thus information can be protected if it can also be independently established as long as it will take considerable effort [125]. Information will be

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[122]. Abernethy v Hutchinson (1824) 3 LJCh 209, See Lamb v Evans [1893] 1 Ch 218 at 230; Caird v Sime (1887) 12 App Cas 326; Heydon 88-89 although some statements are too wide; Gurry 75-76; Cf the narrow view that was followed by the Scottish court in Exchange Telegraph Co Ltd v Guilianotti 1959 SLT 293 at 297.

[123]. Ropeways Ltd v Hoyle (1919) 120 LT 538 at 543-544. The protection of a slight change to a well known formula can probably be contested on this ground; Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203 at 215; Ackroyds (London) Ltd v Islington Plastics Ltd [1962] RPC 97 at 104; O Mustad and Son v Dosen [1963] RPC 41 at 43; Franchi v Franchi [1967] RPC 149 at 152-153; Coco v AN Clark (Engineers) Ltd [1969] RPC 41 at 47, 51; Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 825; United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 167; Potters-Ballotini Ltd v Weston-Baker [1977] RPC 202 at 206; Woodward v Hutchins [1977] 2 All ER 751 at 754; Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 209; Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 598; Berkeley Administration Inc v McClelland [1990] FSR 505 at 527; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425; Mainmet Holdings plc v Austin [1991] FSR 538 at 546; Gurry 70; Heydon *McGill* 337; Blake 672; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36; Harben Pumps (Scotland) Ltd v Lafferty 1989 SLT 752 at 753; Earl of Crawford v Paton 1911 SC 1017 discussed by McBryde 598; Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) 689; Premier Medical and Industrial Equipment (Pty) Ltd v Winkler 1971 (3) SA 866 (W) 869-870; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 78; Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd 1977 (1) SA 316 (T) 321 with reference to Saltman supra, 322 see the argument of counsel, See Domanski 446 and JM Burchell "Confidential Information" (1978) 7 *BML* 121; SA Historical Mint (Pty) Ltd v Sutcliffe 1983 (2) SA 84 (C) 93; Easyfind International (SA) (Pty) Ltd v Instaplan Holdings 1983 (3) SA 917 (W) 927 mentioned Aercrete SA (Pty) Ltd v Skema Engineering Co (Pty) Ltd 1984 (4) SA 814 (D) 822; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 436; Schultz v Butt 1986 (3) SA 667 (A) 680; Harchris Heat Treatment (Pty) Ltd v ISCOR 1983 (1) SA 548 (T) 551 see on appeal where a different view was taken of the facts 1987 (4) SA 412 (A); Cambridge Plan AG v Moore 1987 (4) SA 821 (D) 845; Cf Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 487, Cf 509 is probably too wide, See the criticism Domanski 242; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 433; Domanski 230 with reference to Joubert "Die Reg tot Inligting" 1985 *De Iure* 42; Neethling (1990) 560; Cf Kerr 511 and the passage also referred to in Heydon 107, But see the criticism of the further points made by Heydon infra 5.4.

[124]. Spencer v Marchington [1988] IRLR 392 at 395 on rates for temporary staff or for supplying permanent staff.

[125]. United Indigo Chemical Co Ltd v Robinson (1931) 49 RPC 178 at 186-187 will not be acceptable today. The materials used in a process was not regarded as confidential as it could be easily determined but there were other aspects that would today be confidential, See the criticism Turner 74 with reference to Merryweather v Moore [1892] 2 Ch 518 at 524 and Reid and Sigrist Ltd v Moss and Mechanism Ltd (1932) 49 RPC 461; Terrapin Ltd v Builders' Supply Co (Hayes) Ltd [1960] RPC 128 at 142 accepted Roxburgh J at first instance quoted 130 and later

confidential if it will involve considerable effort to discover its corpus in the useful form that it has taken on in the hands of the employer [126].

The test for inaccessibility is fundamentally objective. Information will not be a trade secret merely because the parties have assigned this label to it [127]. But indiciae that have a subjective tint will play a role in showing that information is objectively confidential:

- It will be significant if information is only allowed limited circulation [128]. It has been stressed that the holder of the information should treat the information as confidential or do everything in his power to ensure that the information remains secret [129].

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reported Terrapin Ltd v Builders' Supply Co (Hayes) Ltd [1967] RPC 375; Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203 at 215; Ackroyds (London) Ltd v Islington Plastics Ltd [1962] RPC 97 at 104; Cranleigh Precision Engineering Ltd v Bryant [1964] 3 All ER 289 at 295-296, See also 302 the court suggested that Roxburgh J's decision was not expressly accepted in Terrapin but this cannot be accepted; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 642-643 this was probably what the court was protecting here. See further infra 5.2.2, Walker 188 should be viewed in this light; Seager v Copydex Ltd [1967] RPC 349 at 368 but see the criticism 5.5; Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498 at 506; Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 825, 820-821; Potters-Ballotini Ltd v Weston-Baker [1977] RPC 202 at 206; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1480; PSM International plc v Whitehouse [1992] IRLR 279 and the discussion 282; Gurry 70; This played a role in SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36; MacQueen *Stair Encyclopaedia* 1460; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 79 is open to question; Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd 1977 (1) SA 316 (T) 323-325; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 500; Aercrete SA (Pty) Ltd v Skema Engineering Co (Pty) Ltd 1984 (4) SA 814 (D) 821-822; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 528-529; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57.

[126]. E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 308 is probably too strict, See the criticism and explanation Turner 84; Stevenson Jordan and Harrison Ltd v Macdonald and Evans (1952) 1 TLR 101 at 104; Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203 at 215; Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498 at 505-506; Coco v AN Clark (Engineers) Ltd [1969] RPC 41 at 47; Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 825; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 135 and the argument of counsel. But it was rejected on the facts 140; Roger Bullivant Ltd v Ellis [1987] ICR 464 at 475 although the court took a too narrow view; Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 140-141; Heydon 87; Gurry 71; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 454 mentioned that the defender had not attacked the restraint on the basis that others also had access to some of the information; Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd 1977 (1) SA 316 (T) 323ff; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 500; There are limits to this SA Historical Mint (Pty) Ltd v Sutcliffe 1983 (2) SA 84 (C) 93; Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 190-192, 194-195, See Domanski 435; Northern Office Micro Computers (Pty) Ltd v Rosenstein 1981 (4) SA 123 (C) 137-138; Harchris Heat Treatment (Pty) Ltd v ISCOR 1983 (1) SA 548 (T) 551.

[127]. Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 138; Berkeley Administration Inc v McClelland [1990] FSR 505 at 525; Mainmet Holdings plc v Austin [1991] FSR 538 at 544 with reference to John Zink Co Ltd v Lloyds Bank Ltd [1975] RPC 385; Petre & Madco (Pty) Ltd v Sanderson-Kasner 1984 (3) SA 850 (W) 858; Domanski 230.

[128]. Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 138; Mainmet Holdings plc v Austin [1991] FSR 538 at 543.

[129]. United Indigo Chemical Co Ltd v Robinson (1931) 49 RPC 178 at 186-187, Discussed Gurry 180-181; Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498 at 503, 505; Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 825; Heydon 87; Blake 674; Gurry 85; Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 194; Domanski 230 with reference to Joubert "Die reg op inligting" 1985 De Jure 42.

- The court will look at the extent to which it was impressed on the employee that the information was confidential [130].
- The subjective knowledge of the holder of information that such knowledge constitutes a trade secret may play some role [131]. However, the contentions in *Thomas Marshall* [132] cannot be accepted. In casu [133] Megarry V-C laid down several requirements for determining when information or knowledge should be protectable from the perspective of the holder of information. His approach can be criticised with reference to the most important requirement within his scheme. He submitted that the owner of knowledge should reasonably believe that the information is confidential or secret, i.e. not in the public domain. The judge concluded that information would be protected even if it was proven that the reasonable belief was false. But this cannot be accepted, even if it is acknowledged that the judge qualified his statement by noting that only reasonable perceptions of the owner of a purported secret should be conclusive. The subjective knowledge of the employee may play some role in determining this issue, but is again not a necessary requirement in restraint of trade cases. This issue may be conclusive in barring a claim based on implied protection but it will only be a factum probandum in restraint cases [134].

It is most important that the determination of these issues be looked at in context. It will be fundamental to determine these questions in the light of uses and practices in a particular industry [135].

5.2.2. Personal skill and knowledge

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[130]. E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 307; Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498 at 505, 507; United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 173, 172 and the comparison between the Under Water Welders and the Printers and Finishers cases criticised infra 5.6; Ansell Rubber Co Ltd Pty v Allied Rubber Industries Pty Ltd [1972] RPC 811 823 with reference to Amber Size and Chemical Co Ltd v Menzel [1913] 2 Ch 239 at 241-242 where it was stressed for the purpose of implication; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 138, Discussed Mainmet Holdings plc v Austin [1991] FSR 538 at 543; Berkeley Administration Inc v McClelland [1990] FSR 505 at 525; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425; McBryde 598; Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) 691 will not necessarily be conclusive.

[131]. Infra 5.6.

[132]. Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193.

[133]. Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 209 and 210; McBryde 598; These factors are also mentioned by the court in Multi Tube Systems (Pty) Ltd v Ponting 1984 (3) SA 182 (D) 186.

[134]. Emphasis on this in Caribonum Co Ltd v Le Couch (1913) 109 LT 385 at 388 was not really explained in the case; Amber Size and Chemical Co Ltd v Menzel [1913] 2 Ch 239 at 245 although the precise role of this requirement was not stated; Multi Tube Systems (Pty) Ltd v Ponting 1984 (3) SA 182 (D) 185 but it was apparently seen as a requirement for a claim and not as a requirement for confidentiality; Domanski 239 relying on bona fides. See the further discussion of bona fides infra 16.

[135]. Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 209 and 210; Gurry 72-73; Turner 84.

Mere personal skill and knowledge cannot be protected by restraint [136]. Trade secrets will have to be distinguished from information that has been acquired during employment but which constitutes general skill and knowledge [137], although it is notoriously difficult to determine in what class particular information falls [138].

The distinction has mostly been drawn by keeping the reasons for its existence in mind [139]. General knowledge or information that is of general applicability in an industry will not be protectable [140].

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136. Infra 8.2, 8.3.

137. Mallan v May (1843) 11 M & W 653 at 666 the court saw the fact that skill and experience would be gained as a reason for upholding the restraint, See the criticism Herbert Morris 709; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 314 although the principle is much further developed today; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 773; Mason 740-741, 742; Herbert Morris 711, 714-715, Cf especially on subjective and objective knowledge: Mason 740-741, Herbert Morris 711, 714-715, Turner 132, Gooderson 415, Selwyn 386, Trebilcock 86; Cf the argument of counsel in Forster and Sons Ltd v Suggett (1918) 35 TLR 87 at 88 although it was not accepted on the facts; E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 309-310 in turn referring to United Indigo Chemical Co Ltd v Robinson (1931) 49 RPC 178 at 187 and Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 88 although this principle was not clearly expressed in either see infra 5.4. and 5.6; Stevenson Jordan and Harrison Ltd v Macdonald and Evans (1952) 1 TLR 101 at 104; John Zink Co Ltd v Lloyds Bank Ltd [1975] RPC 385 at 388; Potters-Ballotini Ltd v Weston-Baker [1977] RPC 202 at 206; Evening Standard Ltd v Henderson [1987] ICR 588 at 592; Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 343, 350 especially 351; Lock International plc v Beswick [1989] 3 All ER 373 at 378; Ixora Trading Inc v Jones [1990] FSR 251 at 259; Mainmet Holdings plc v Austin [1991] FSR 538 at 544, 546; Heydon 103-107, But see infra 5.4; Farwell 66-67; Gurry 67-68, 211; Turner 120ff; Sales 610 and the discussion of GD Searle & Co Ltd v Celltech Ltd [1982] FSR 92, Baker v Gibbons [1972] 1 WLR 693 on knowledge of the abilities of fellow employees; Scottish Law Commission 40 20; MacQueen *Stair Encyclopaedia* 1468, 1469; McBryde 599 with reference to Rentokil infra; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 79, 80; Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd 1977 (1) SA 316 (T) 322, 327; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 335 but see the criticism infra 5.6; Northern Office Micro Computers (Pty) Ltd v Rosenstein 1981 (4) SA 123 (C) 138; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 486; Aercrete SA (Pty) Ltd v Skema Engineers Co (Pty) Ltd 1984 (4) SA 814 (D) 822; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 430; Pistorius 344; Woker 334; See further discussion of the protection of personal skill and investment in human skills infra 8.2 and 8.3.

138. Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 342; Blake 653; Turner 120; MacQueen *Stair Encyclopaedia* 1468; Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 193-194 with reference to Callmann *Unfair Competition Trademarks and Monopolies* 3rd ed vol II para 54.2, This is also quoted in Bonnet v Schofield 1989 (2) SA 156 (D) 159, Domanski 435; Northern Office Micro Computers (Pty) Ltd v Rosenstein 1981 (4) SA 123 (C) 136; SA Historical Mint (Pty) Ltd v Sutcliffe 1983 (2) SA 84 (C) 91, Domanski 238; Knobel 497.

139. Callmann *Unfair Competition Trademarks and Monopolies* 3rd ed vol II para 54.2 and the references Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 193-194, Northern Office Micro Computers (Pty) Ltd v Rosenstein 1981 (4) SA 123 (C) 136; On the principles underlying unprotectability of personal skill infra 16.2.

140. Herbert Morris 711; Millers Ltd v Steedman (1915) 31 TLR 413 at 416 cannot be accepted; Triplex Safety Glass Co v Scorah [1938] Ch 211 at 215; Stevenson Jordan and Harrison Ltd v Macdonald and Evans (1952) 1 TLR 101 at 104; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 641; Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 815, It is impossible to make sense of the discussion 822 the court completely misquoted Sir WC Leng. The judge probably meant particular knowledge; United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 172, 173; The point is made by the plaintiffs in Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 135; Berkeley Administration Inc v McClelland [1990] FSR 505 at 527; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425; Heydon 104; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 22 with reference to Commercial Plastics supra; Coolair Ventilators Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W)

Knowledge of business organisation will accordingly often be unprotectable as it frequently concerns nothing more than a knowledge of "reasonable mode of general organisation" [141]. The emphasis must, nevertheless be placed on *generality* [142]. Statements that can be interpreted widely have sometimes been made [143], but unique information about policy and organisation will be protectable [144]. Some Scottish authorities have submitted that information about policy and organisation can be protected in Scotland but not in other legal systems [145]. Yet, Scots law is in line with other systems on this point. Such information will be protectable in all three systems as long as it is not general [146]. Wide statements such as the one in *Commercial Plastics* must be interpreted in context.

It is difficult to discern if the personal skill requirement is truly a second hurdle after the determination of inaccessibility in the narrow sense. The determination that information is merely personal skill mostly only excludes information that would not pass the test for inaccessibility. They cannot be viewed as completely separate. However, the two elements are also not absolutely

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689. The court incorrectly accepted that general information would be worthless but that is not necessarily true. The issue was here more directly applied to the confidentiality question, See especially Knobel 497; See the authorities mentioned by Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 193-194 and Bonnet v Schofield 1989 (2) SA 156 (D) 159 especially the discussion of the American authority Callmann ibid, Domanski 436 criticised the distinction between general and special knowledge with reference also to HJO Van Heerden and J Neethling *Die Reg Aangaande Onregmatige Mededinging* (1983) 139-140, Christie 444; Pistorius 345.

141. Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 774, 768-769, Trebilcock 88 does not cast much new light on this; Herbert Morris 703 but see infra, Referred to Berkeley Administration Inc v McClelland [1990] FSR 505 at 524; Herbert Morris 704-705, 711, 712, Cf Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 433 and the reliance on Herbert Morris; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1485; Ixora Trading Inc v Jones [1990] FSR 251 at 258-259, 261; Cheshire Fifoot and Furmston 407-408; Turner 124ff.

142. Gurry 94.

143. Herbert Morris 703; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394 although the court contrasted it with "special knowledge"; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 641, Cf however 642 where the court talked of general education and method; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 22 with reference to Commercial Plastics supra; Cf MacQueen *Stair Encyclopaedia* 1468 where it was simply stated that information of organisation will be protected in extraordinary circumstances; Cf Ex Parte Spring 1951 (3) SA 475 (C) 479 where the wide statement made by counsel was not really addressed by the court; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 314 is apparently too wide "methods of operating and knowledge of conditions of business" cannot always be protected, Christie 444 the ideas were ostensibly taken from Drewtons and is subject to similar criticism; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 256, 259; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 436; The suggestion in Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 430, 432-433 cannot be accepted.

144. Stuart & Simpson v Halstead (1911) 55 Sol Jo 598 although the court felt that no secret information was acquired; A too wide view was probably taken in Millers Ltd v Steedman (1915) 31 TLR 413 at 414, Cf also the criticism of the general approach to personal skill in this case infra; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472, See Walker 188, McBryde 599; SOS Bureau Ltd v Payne 1982 SLT ShCt 33; Counsel for the pursuer in Rentokil Ltd v Kramer 1986 SLT 114 at 116 but the court stressed other issues; See the cases infra 5.7.

145. Woolman 255 and Scott Robinson 160 (also mentioning Rentokil Ltd v Kramer supra) considered that there was a contradiction between Commercial Plastics on the one hand and the Scottish cases of SOS Bureau Ltd v Payne 1982 SLT ShCt 33 and A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299.

146. Malden Timber Ltd v McLeish 1992 SLT 727 at 734-735.

similar. Perhaps the only distinction is that the personal skill requirement approaches the trade secret question from another important perspective.

5.2.3. The value and purpose of the information

It has sometimes been stressed that information must be valuable [147] or, preferably, commercially valuable [148] before it can be protected. Thus, commercial value is probably a necessary requirement of protection in these cases. But two approaches must be criticised:

- Too much emphasis was placed on this aspect in *Coolair* [149]. The court suggested that information that is valuable is prima facie protectable.
- In *Thomas Marshall* [150] the court stated that the owner of the information must *reasonably believe* that release of the information would harm him or benefit his competitors and this is too subjectively stated. But subjective perceptions will again play some role as an indicator that information constitutes a trade secret

5.3. Information that can be protected during and after employment

There is an obligation on an employee to act with fidelity and good faith during employment. Information that is only "confidential" in that it will constitute a breach of the obligation to act with good faith during employment cannot always be protected after employment has terminated.

The two situations have now been clearly delineated where there is no explicit restraint [151]. However, some difficulty exists in the case of express restraints. Goulding J in *Faccenda Chicken*

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147. Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 598; United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 166; Cf Coco v AN Clark (Engineers) Ltd [1969] RPC 41 at 48 where the court doubted whether it was necessary for a claim in equity, Heydon 87; Malden Timber Ltd v McLeish 1992 SLT 727 at 734; Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 194; Pistorius 345.

148. Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425 who saw this as a basis for distinguishing confidential information from trade secrets; Gurry 82-83 did not regard this as separately important for establishing the general protection of information in terms of the doctrine of confidentiality. A different principle may however apply in post-employment cases; See Neethling (1991) 560; Knobel 497 with reference to Coolair Ventilators Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) 689, See the criticism of Coolair infra.

149. Coolair Ventilators Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) 689.

150. Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 209 and 210.

151. Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 815, 825; United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 166-167; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136-138 with reference to E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 and Printers and Finishers Ltd v Holloway [1965] RPC 239 at 253; Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 345-346; Manor Electronics Ltd v Dickson [1988] RPC 618 at 624; Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 139-140; Lock International plc v Beswick [1989] 3 All ER 373 at 378; Ixora Trading Inc v Jones [1990] FSR 251 at 259; Mainmet Holdings plc v Austin [1991] FSR 538 at 543; Treitel 404; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40 counsel argued that information would be more strongly protected where

[152] initially contended that the information protectable during employment relationships would also be protectable after termination of employment by explicit restraint. But this view has been duly rejected by Neill LJ on appeal [153]. Information protectable during employment should be much wider because the proper and bona fide operation of the work relationship must be ensured during that period. Wider obligations exist during employment as the skills and knowledge of the employee will not be inhibited. The employee will merely have to use it for the purpose of the employer. After employment this ratio falls away in cases of express as well as implied protection. The interests of the parties diverge; the covenantee must only be protected against abuse of what can truly be described as information belonging to him.

Later cases that doubted the approach of Neill LJ in *Faccenda* on this point must be rejected [154]. The reasons given in *Balston* [155] for accepting the view of Goulding J deserve particular attention:

- Scott J incorrectly interpreted *Faccenda* and *Printers and Finishers*. He referred to the statements that some information can only be protected by express restraint. The judge stated that the type of information that is not merely confidential in the sense that it is

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it had been clandestinely obtained for competition. The court did not finally decide the point although it showed sympathy for the view, See counsel Malden Timber Ltd v Leitch 1992 SLT 757 at 761; Malden Timber Ltd v McLeish 1992 SLT 727 at 734 and especially the summary of law 731 this has now become a widely accepted set of tenets; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1158 accepted 1160; Malden Timber Ltd v Leitch 1992 SLT 757 at 760 relied on by both counsel, The pursuer 761 stated that Faccenda was not boldly accepted in Scotland but see the criticism infra 5.7, 763 did not finally lay down the basis for distinction between the different types of protectable information but the court accepted that there would be a distinction; MacQueen *Stair Encyclopaedia* 1467, 1468, 1469; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 526-527. Pistorius 340 was critical of the acceptance of the judgment of Goulding J in Faccenda. But her views are unacceptable; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 430-432 with reference to Faccenda Chicken a quo, Pistorius 340 averred that this principle conflicted with the broad notions as set out by Stegmann J but that is not acceptable cf infra 5.3.

[152]. Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 599. Some of the elements of such a distinction can be discerned from Printers and Finishers Ltd v Holloway [1965] RPC 239 at 253 although this passage was also quoted without comment in the Court of Appeal where a different view was taken; Roger Bullivant Ltd v Ellis [1987] ICR 464 at 437 where these arguments were limited to implied protection; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 431 quoted the view of Goulding J without mentioning the criticisms of the Court of Appeal on this point; Knobel 497 also seems to take this view.

[153]. Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 137 with reference to Herbert Morris 709 although the case does not provide clear authority for it, 138 and the criticism of the court a quo; Ixora Trading Inc v Jones [1990] FSR 251 at 258 although the court apparently did not regard the issue as finally settled 259, 261; Mainmet Holdings plc v Austin [1991] FSR 538 at 544 this is what the court meant when it stated that "information which is not a trade secret does not become entitled to protection merely because it comes within the wide terms of an express covenant"; Chitty 1205; Malden Timber Ltd v McLeish 1992 SLT 727 at 734 although the judge finally just emphasised that implied protection of such information will not be allowed; Implicit in Malden Timber Ltd v Leitch 1992 SLT 757 at 763.

[154]. Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 347; Ixora Trading Inc v Jones [1990] FSR 251 at 258, Cf 261 where the point is apparently left more open; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 384; MacQueen *Stair Encyclopaedia* 1470 also seems to take a view of Faccenda that is not justified by the case; Cf the suggestions MacQueen 341.

[155]. Ibid.

protectable during employment will already be protectable by implied restraint. Hence, he concluded that some information that is confidential in the limited sense was still regarded as protectable by express restraint. However, the passages relied on concerned different issues [156].

- Scott J accepted that restraints could protect wider information because they are limited spatially and temporally. However, implied protection will also be limited in the granting of remedies [157]. It is in any event difficult to see why this distinction, even if it exists, should carry much weight when it comes to the type of information that can be protected.

Some of the factors mentioned by the court may play a role in distinguishing express and implied protection but it cannot apply on this level [158].

It is still very difficult to distinguish information that can be protected during employment from information that will also be protectable afterwards. Different bases for distinction have been proposed and some of them must be rejected.

- In *Lansing Linde* [159] Staughton LJ specifically attempted to establish the distinction between the different types of information. Yet he did not come up with much. He concluded that only information that will cause commercial harm and information of which the dissemination is limited will be protectable after employment. However, it is doubtful whether information not meeting these requirements will be protectable during employment.
- In South Africa in *Knox* [160] the court distinguished information that is carried away in the head of the employee, and is therefore not permanently protectable, from information that is. But the protectability of information even after termination of employment will not necessarily be undermined merely because it is carried away in the head of the employee [161] and information that is only protectable for a limited duration should also, in many cases, be protectable qua trade secrets after employment has terminated [162]. The argument in *Knox* was based on the English case of *Roger Bullivant* [163] where the court protected information in a card index that was taken away during employment. *Roger Bullivant* accepted that the index would not be protectable, without more, after termination of

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156. See infra 5.6.
157. Chitty 1205 only accepted that legal protection will normally be unlimited. This is still too wide.
158. See infra 5.6.
159. Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425, see 426 the court apparently doubted whether the distinction existed at all, See MacQueen *Stair Encyclopaedia* 1471.
160. Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 527 and especially 528-529.
161. Infra 5.4.
162. Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 138; Pistorius 340 with reference to Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 430 although it is not clear whether the dictum pertains to this point; No post-employment protection has ever been refused purely on this basis.
163. Roger Bullivant Ltd v Ellis [1987] ICR 464.

employment [164]. But it was regarded as protectable as it was irregularly taken away during employment [165]. The court stressed that information was protectable even though it would only be guarded for a limited duration [166]. Accordingly, this case is open to the *Knox* interpretation. But it is doubtful whether it should be so understood. The court did not have to decide, and did not clearly decide, that information that was not permanent would never be protectable after termination.

The distinction can only be drawn by keeping its purpose in mind [167]. Information that is protectable during employment will not necessarily be confidential in the sense described above. The Court of Appeal in *Faccenda Chicken* described such information as being confidential in inverted commas. With information that is protectable during employment, the court will have to ask if it would be against the fidelity of the relationship for an employee to use or disclose it. After termination of employment the question will be whether the information is secret information belonging to the employer so that it would even be unacceptable to disclose or use it after such termination.

The question will be one of degree:

- Different degrees of accessibility or confidentiality will be required [168] although it will often be difficult to distinguish the different shades of confidentiality.
- A significant role will be ascribed to the distinction between confidential information and personal skill and knowledge [169]. But the rule cannot be that the personal skill and knowledge test only applies after employment. There is no clear distinction between the personal skill and confidentiality questions while there is no reason why mere personal skill should be restrictable during employment. Yet the personal skill test approaches this issue from an angle that will be particularly important.

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164. Roger Bullivant Ltd v Ellis [1987] ICR 464 at 473-474.
165. Roger Bullivant Ltd v Ellis [1987] ICR 464 at 473-474.
166. Roger Bullivant Ltd v Ellis [1987] ICR 464 at 476ff; Cf PSM International plc v Whitehouse [1992] IRLR 279 at 282 where similar arguments were relied on by counsel as a further alternative but the court did not discuss it fully.
167. Gurry 177-179, 198; MacQueen *Stair Encyclopaedia* 1471 no clear distinction can be drawn.
168. Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1484 is too rigid; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136 talked of a "sufficient high degree of confidentiality"; Ixora Trading Inc v Jones [1990] FSR 251 at 258; Malden Timber Ltd v McLeish 1992 SLT 727 at 734; Malden Timber Ltd v Leitch 1992 SLT 757 at 760 and the discussion of Faccenda.
169. Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 599; Manor Electronics Ltd v Dickson [1988] RPC 618 at 624.

In South Africa Pistorius [170] asserts that the whole distinction should be rejected; she states that: "The fact that an employee has left the employment of her employer cannot be the touchstone to determine the confidentiality of information". But the distinction is not aimed at delineating what is confidential. It rather concerns the level of "confidentiality" - using this word in the widest sense - that is required before information will be protectable. A wider obligation to protect information exists during employment than after it. The author was correct in criticising *Knox* [171]; the court in that case took a too narrow view of the information that could be protected after employment had terminated. But the wider opprobrium levelled at other authorities is based on a misinterpretation of those authorities.

5.4. Recollected information

Some authorities suggest that information should not be protectable if it will necessarily be impressed on the mind of the employee, as such information becomes mere personal skill [172]. But this is unacceptable as a general proposition [173]. It would be too formalistic, as it confuses the protection of information and the physical form that it takes on. The inherent nature of information should determine its protectability. Information committed to memory has been protected in many cases [174].

Some authorities are too wide [175], but most of the cases that seem to create the impression that memorised information cannot be protected can be explained. Several trade secret principles will increase the likelihood that particular memorised information will not be protected:

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[170]. Pistorius 344.

[171]. Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W)

[172]. Gurry 69; Heydon 105 the cases that he relied on do not support such a wide thesis; This aspect was also stressed MacQueen *Stair Encyclopaedia* 1469.

[173]. Cf Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 343 where the court placed too much emphasis on this issue in determining that information was personal skill; See the criticism of Trebilcock 86; Cf Comments (1951) 19 *University of Chicago Law Review* 97 at 104.

[174]. Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 823 with reference to Amber Size and Chemical Co Ltd v Menzel [1913] 2 Ch 239 at 241-242; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 642; Printers and Finishers Ltd v Holloway [1965] 1 WLR 1 at 5; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1479, 1485; Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 559 a trade secret can be protected though it was learnt by heart; Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 142-143 see especially the discussion of Balston Ltd v Headline Filters Ltd [1987] FSR 330; Turner 77 and the discussion Morison v Moat (1851) 9 Hare 241, Amber Size and Chemical Co Ltd v Menzel (1913) 30 RPC 433, Ellolite Ltd v Thomas Travis and Insulators Ltd (1913) 30 RPC 366 at 352, Turner 141; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40 a very narrow argument was formulated by counsel for the defender. The court did not reject it outright but accepted that such a principle could not apply where an employee clandestinely memorised information during employment for the purpose of using it afterwards; Rentokil Ltd v Kramer 1986 SLT 114 at 116 although it was not clearly related to trade secrets.

[175]. Merryweather v Moore [1892] 2 Ch 518 at 524; Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 88 quoted in United Indigo Chemical Co Ltd v Robinson (1931) 49 RPC 178 at 183 see the interjections, 187 although the court

- It already suggests that the employee will have difficulty in otherwise acquiring the information if he copies or takes away documents with him. It should play some role in establishing inaccessibility [176].
- It will offend against the implied duty of an employee to act bona fide during employment where documents are surreptitiously taken away or copied during such employment [177]. However, where information is merely memorised in the normal currency of activities, it will only be protectable in terms of the narrower post-employment obligations. Most memorised information falls in this category, although information that is purposefully memorised during employment and outside normal duties will for this purpose be treated like documents [178].
- The employee-related requirement for the protection of a trade secret will often play an important role. Recollected information will not constitute a trade secret if elements of a wider trade secret that do not in themselves constitute a trade secret are carried away. This will be particularly true in cases where information is only confidential as a corpus but is only remembered in a piecemeal manner. In some cases the courts have held that such information is not confidential, while other recollections were not protected because they were regarded as part of the personal skill and knowledge of the confidant [179].

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also mentioned a more acceptable ground for rejecting an interdict, See Turner 137-141; E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 307 although the case was also decided on different grounds infra.

176. Heydon *McGill* 337

177. Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 641; This seems to be the basis of Printers and Finishers Ltd v Holloway [1965] RPC 239 at 253; Roger Bullivant Ltd v Ellis [1987] ICR 464 at 474 where the breach of the duty of good faith was stressed; Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 140-141, 143; Harben Pumps (Scotland) Ltd v Lafferty 1989 SLT 752 at 754; MacQueen *Stair Encyclopaedia* 1467; Knobel 497 with reference to Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd 1977 (1) SA 316 (T) 326-327 although the point was merely made in a quote from an Australian case. It is unclear to what extent the facts here are similar; Cambridge Plan AG v Moore 1987 (4) SA 821 (D) 846; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 428, 433.

178. Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136; Mainmet Holdings plc v Austin [1991] FSR 538 at 543; Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 59 although it was stressed that information about customers was not sufficiently confidential to be protectable; Gurry 69; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40 discussed supra. Although the court did not clearly relate it to the intentional memorisation of information; Lux Traffic Controls Ltd v Healey 1994 SLT 1153; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 428, 433.

179. Herbert Morris 703, 712; Ropeways Ltd v Hoyle (1919) 120 LT 538 at 543; E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 309; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 641; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 433; See Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 140-141; Blake 650-651 cannot be accepted. He did not properly distinguish trade secret and customer connection; Lock International plc v Beswick [1989] 3 All ER 373 at 378; Turner 77, 136-137, 141; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1159-1160; Christie *Encyclopaedia* 595 quoting Herbert Morris supra; Northern Office Micro Computers (Pty) Ltd v Rosenstein 1981 (4) SA 123 (C) 137-138; These issues appear to have played some role in Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 428, 433 although it might perhaps also be interpreted as laying down a general rule, Cf Pistorius 339-340 apparently thought that the court laid down a general tenet.

- Recollected information will be problematic when it comes to the enforcement of implied or express obligations against use and disclosure. Such information will often be insufficiently clear and separate [180]. Courts should be cautious about restricting employees in using such information [181].

It is merely an indicator that such information does not constitute a trade secret where it is not carried away in any corporeal form but it is not, in itself, a reason for not protecting information.

5.5. Duration of trade secrets

Logically, any one of two contingencies can terminate the special status of information.

- It could be expected that information can only be protected for as long as it is not public [182].
- Information that can be independently established should only be protectable for as long as it would reasonably have taken the confidant to achieve this [183].

Nevertheless, possible exceptions to this principle have developed.

It has been suggested that protectable information does not lose its status where the information has become public without consent of the holder [184], but this principle is unacceptable.

- It is the nature of the information rather than the source from which it was acquired that should determine protectability. The aim is to protect information and not to penalise the confidant. Any other approach would be overly formalistic and highly unfair towards the employee confidant [185].

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[180]. Measures Bros Ltd v Measures [1910] 1 Ch 336 at 346; United Indigo Chemical Co Ltd v Robinson (1931) 49 RPC 178 at 187 mentioned in E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 309 although some of the language used in these cases is somewhat wide see infra 5.6; Printers and Finishers Ltd v Holloway [1965] 1 WLR 1 at 6 see infra 5.6; United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 173; PSM International plc v Whitehouse [1992] IRLR 279 at 282 and the discussion of Printers and Finishers Ltd v Holloway [1965] 1 WLR 1; Turner 77 and the discussion of Lamb v Evans, Turner 77-78; There are some indications that the court in Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 335 was addressing this point, See Domanski 235. But the language used by the court is confusing.

[181]. Infra 5.6.

[182]. O Mustad & Son v Dosen [1963] RPC 41; Franchi v Franchi [1967] RPC 149 at 152-153; MacQueen *Stair Encyclopaedia* 1461.

[183]. Roger Bullivant Ltd v Ellis [1987] ICR 464 at 477; PSM International plc v Whitehouse [1992] IRLR 279 and the discussion 282; MacQueen *Stair Encyclopaedia* 1462; Multi Tube Systems (Pty) Ltd v Ponting 1984 (3) SA 182 (D) 189-190, Domanski 239; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 528; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 430; Neethling (1991) 561.

[184]. Peter Pan Manufacturing Corp v Corsets Silhouette Ltd [1963] RPC 45 at 54-55 where this question was not finally decided; Cranleigh Precision Engineering Ltd v Bryant [1964] 3 All ER 289 at 298ff saying that this echoed Reid and Sigrist Ltd v Moss and Mechanism Ltd (1932) 49 RPC 461 at 480. But it is not clear whether Cranleigh was decided on this point, Cf MacQueen *Stair Encyclopaedia* 1461.

[185]. Gurry 246-247 accepted that the distinction in Cranleigh was artificial, See also 249-252.

- *Terrapin* [186], the case on which this doctrine was based, did not intend such a principle. In casu the mode of construction of a product was confidential. The product was marketed. The court held that the information was protectable though the product itself was marketed because it would still take considerable effort and time to establish the information by dis-assembling the product. Here the information had not yet become public in the true sense.

There are only two types of cases where publication should not terminate obligations of confidentiality:

- A person may be restricted after information has become public where time was won by use before information was published. Where a secret is used to construct machinery that can be used in a manufacturing process and X months before disclosure has already been taken to construct the machinery, then the covenantor can still be restricted from using the machinery for X months after the information has become public.
- The confidant cannot benefit from his own disclosure in breach of confidentiality [187].

Information that can be independently discerned will only be protectable for as long as it is not public, or for the period that it would actually take to catch up independently. In *Coco* [188] the court discussed the position of a person who had acquired information but who might have independently worked it out himself over a period. The judge said that such a case would be problematic because the confidant would either have to go through the process of determining the information himself or wait for the information to become public. However, the court should only allow protection for as long as it would have taken to develop the information independently or until it becomes public. After that time the information may be used irrespective of its actual source. The court in *Coco* placed too much emphasis on derivation.

A restraint for the protection of a trade secret may only endure for the duration of the trade secret as here set out. But acceptable duration will also be influenced by the time at which reasonableness has to be determined [189]. A restraint may in England and Scotland be reasonable if it actually exists

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[186]. Terrapin Ltd v Builders' Supply Co (Hayes) Ltd [1967] RPC 375, Cf Ansell Rubber Co Pty Ltd v Allied Rubber Industries (Pty) Ltd [1972] RPC 811 821 the court was critical of the use of Terrapin in Cranleigh; Heydon 88 does not recognise the differences between the cases; Gurry 247-249; Cf MacQueen *Stair Encyclopaedia* 1462.

[187]. Speed Seal Products Ltd v Paddington [1985] 1 WLR 1327 at 1332; Trebilcock 91.

[188]. Coco v AN Clark (Engineers) Ltd [1969] RPC 41 at 49, Cf Potters-Ballotini Ltd v Weston-Baker [1977] RPC 202 at 206-207 accepted that there might come a time when information will not be protectable any more although the issue was not taken any further, Cf Balston Ltd v Headline Filters Ltd [1987] FSR 330 343, 344 also made a similar point in discussing the distinction between personal skill and trade secrets.

[189]. Gurry 212-213; Heydon 161.

for longer than this, as long as it was foreseeable at conclusion that this requirement would be met [190].

5.6. The distinction between express and implied protection/separability of information

After termination of employment, trade secrets can be protected by implied terms or explicit restraint. The authorities believe that there is some distinction between the two sources of protection [191]. But along what lines?

There is no clear substantive difference between the types of information that can be protected. Restraints cannot be used to protect information after termination of employment that will be protectable during employment but which will be unprotectable by implied term after such termination [192].

The existence of an express restraint might impact subtly on the type of information that courts will protect. Information in principle will have to meet the same requirements in both types of cases but an overview shows somewhat wider protection of trade secrets in express restraint cases. Where there is some doubt, courts will be more prone to accept that a trade secret exists where an express restraint has been concluded [193]. Many of the arguments in *Balston* [194] cannot be accepted but the court made one point that will be relevant here. In cases of express protection there is often an element of choice while the implied term is laid down ex lege. The courts must therefore be extremely cautious in implied protection cases.

Although this issue has not been settled, it might be a requirement for protection based on implication that the employee must know that there were protectable secrets [195]. But it is manifest that there is no such requirement where relief is based on a restraint of trade [196].

The distinction between express and implied protection will become fundamental when it comes to the further question whether a remedy can be granted. A covenantee will have no wider support

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190. In Reid and Sigrist Ltd v Moss and Mechanism Ltd (1932) 49 RPC 461 at 480 can only be explained in the light of this principle.
191. Except for the authorities infra also: E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 307, Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 823.
192. Especially Ixora Trading Inc v Jones [1990] FSR 251 at 258; Supra 5.3.
193. Chitty 1205 makes a similar point.
194. Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 352; Ixora Trading Inc v Jones [1990] FSR 251 at 261; Chitty 1205.
195. See the cases supra 5.2.1. Although such an approach can also be subjected to criticism; Domanski 239.
196. Chitty 1205.

from an express restraint against use and disclosure but for the subtle distinction mentioned above [197]. Yet there will be vast differences between implied protection and more specifically framed restraints. It would be more accurate to say that the distinction actually lies between general restraints against use or disclosure, that are also implied, and more precise restraints of trade for the protection of information.

A restraint of trade will be important for the holder of trade secrets even if he may also achieve implied protection, because implied obligations will only protect against use or disclosure of trade secrets. More comprehensive activities can be restricted by explicit restraint of trade [198].

The separability of information and the ability of the court to grant relief will be most important. The courts will have to balance the need for protection with its aversion to restricting skill and knowledge outside trade secrets [199]. Express restraints can be utilised to bridge the problems that will arise where protectable and unprotectable information are intertwined.

In some cases separability will be irrelevant for the purpose of the remedies that may be granted.

- Information cannot be guarded, through the implied protection of trade secrets or through explicit restraint, where the whole of the information is affected by the part that is not a trade secret to the extent that it also is not a trade secret, even if it would have been protectable standing alone [200].
- The information can be protected by both means if it constitutes a clear and separate trade secret.

However, the degree to which information is inextricable may also impact upon the remedies that can be granted:

- Sometimes trade secrets may exist but they will still be so intertwined with other information that an interdict against use cannot be granted, as such an interdict will interfere widely with personal skill and knowledge [201]. Courts will only allow interdicts, based on implied

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[197]. Turner 120; Some cases cannot be accepted: Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 348, 351, Cf however the suggestion 351, PSM International plc v Whitehouse [1992] IRLR 279 at 282.

[198]. See infra Ch 8.5.4.

[199]. Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 141

[200]. United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 172-173 although some of the cases mentioned apparently fall in the next category; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 138 but see the criticism infra; Berkeley Administration Inc v McClelland [1990] FSR 505 at 526; Mainmet Holdings plc v Austin [1991] FSR 538 at 544, 546; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 433.

[201]. Measures Bros Ltd v Measures [1910] 1 Ch 336 at 346; United Indigo Chemical Co Ltd v Robinson (1931) 49 RPC 178 at 187 mentioned in E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 309 although it is not clear whether Morton J appreciated the import of the statement in United Indigo, See Turner 84; Balston Ltd v Headline Filters Ltd [1987] FSR 330 350-351 can only be explained along these lines although the case is not easy to understand; Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 88; Turner 77-78, See the criticism of these cases

protection, against disclosure. The problem is one of degree and it will be difficult to decide where to draw the line. This was the problem that the court in *Printers and Finishers* attempted to solve when it stressed that a reasonable man would not think that there was something improper in tapping his memory as to particular knowledge and that the restraint could therefore not be enforced [202], although it was not clearly delineated in the case and has led to much confusion [203].

- In other cases the information may contain some elements that are trade secrets, although those elements cannot be circumscribed. In these cases the protectable information cannot be separated from other information which does not constitute trade secrets for the purpose of either use or disclosure [204]. It will leave the covenantor in an impossible position if he is interdicted against use or disclosure in such cases. The law will accordingly not allow implied protection or a restraint to the same effect. Some courts have granted non-disclosure restraints when no clear trade secret is delineated in an attempt to compensate for refusing more comprehensive remedies [205], but these cases are unacceptable.

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supra 5.4; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 335, Coolair Ventilators Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) 690-691 but the emphasis on *own account* is misleading, Domanski 235-236, The explanation of Domanski 237 does not really assist, See the criticism of the judgment supra, Cf the more acceptable view in Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 599 and the discussion of United Indigo.

[202]. Printers and Finishers Ltd v Holloway [1965] 1 WLR 1 at 5, 6, Cf Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 208, PSM International plc v Whitehouse [1992] IRLR 279 at 282.

[203]. Many authorities interpreted this dictum as being a definition of trade secrets: Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 815, Mainmet Holdings plc v Austin [1991] FSR 538 at 543, United Sterling Corp Ltd v Felton and Mannion [1974] RPC 162 at 173 the discussion of Printers and the distinction between it and Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498, Chitty 1205, MacQueen *Stair Encyclopaedia* 1469, Heydon 86, Trebilcock 82.

[204]. Potters-Ballotini Ltd v Weston-Baker [1977] RPC 202 206; The interdict was made more specific Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 142, 143; Lawrence David Ltd v Ashton [1989] ICR 123 at 132 and see especially the discussion of Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193; Lock International plc v Beswick [1989] 3 All ER 373 at 378; Mainmet Holdings plc v Austin [1991] FSR 538 at 544, 546; PSM International plc v Whitehouse [1992] IRLR 279 at 281; Gurry 84-85; The interdict which the Lord Ordinary was prepared to grant in Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 24-25 should probably be regarded as too wide. The court rejected Printers and Finishers without properly considering it. This issue was not raised on Appeal; Harben Pumps (Scotland) Ltd v Lafferty 1989 SLT 752 the interdict here also seems too wide; This issue does not appear to have been properly investigated in WAC Ltd v Whillock 1990 SLT 213 at 217, 219-220. It was argued by the defender that the restraint was not based on precise trade secrets. But the defender later made an undertaking in similar terms and the issue was not really canvassed as the case concerned interim injunction; Malden Timber Ltd v McLeish 1992 SLT 727 at 735 although there are still some problems with vagueness of the remedy; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160; Scotcoast Ltd v Halliday 1995 GWD 7-355; MacQueen *Stair Encyclopaedia* 1471; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 433.

[205]. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 335; Cf Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 41 in determining the balance of convenience in an interim interdict case did not regard this issue as relevant.

In both these types of cases, trade secrets can be protected fairly and effectively by properly framed restraints of trade [206].

5.7. Different types of trade secrets, especially customer and other business knowledge

Trade secrets can roughly be divided into two different categories [207], although no scheme can be rigidly applied [208]. Secrets regarding special manufacturing processes and the technical nature of products are paradigmatic trade secrets [209]. Commercial information such as trade secrets about pricing, customers, suppliers, marketing or important business policies will also, in appropriate circumstances, be regarded as trade secrets [210].

A rudimentary notion that commercial information can be protected by restraint was already recognised in some cases that preceded *Mason* and *Herbert Morris* [211], but it was only refined

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[206]. Printers and Finishers Ltd v Holloway [1965] 1 WLR 1 at 6, Commercial Plastics Ltd v Vincent [1965] 1 QB 623, See Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 601; This is perhaps how the conundrum posed by Megarry J in Coco v AN Clark (Engineers) Ltd [1969] RPC 41 at 47 and 49 should be answered; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1479 although Lord Denning did not clearly keep different issues apart, Cf 1490 it can be submitted to the same criticism, 1485; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 137-138, See the criticism of the interpretation of these cases by Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 347-348 supra 5.3; Lawrence David Ltd v Ashton [1989] ICR 123 at 132-133 but see the criticism of Littlewoods supra; Chitty 1205; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160; Forte 21 emphasised the practical necessity of wider restraint. His argument apparently applies to this point; Freight Bureau (Pty) Ltd v Kruger 1979 (4) SA 337 (W) 340-342.

[207]. Different categorisations were laid down by: Heydon 86, Turner 71ff for a more specific categorisation, Knobel 489 and the examples of trade secrets mentioned, Neethling (1991) 561, Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 428-430, Kerr 511.

[208]. Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 138; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 428; Pistorius 344-345 takes the importance of the categorisation too far and this led to conceptual problems; Kerr 511.

[209]. Phillips v Stevens (1899) 15 TLR 325; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 773; Caribonum Co Ltd v Le Couch (1913) 109 LT 385 and 587; Amber Size and Chemical Co Ltd v Menzel [1913] 2 Ch 239; Herbert Morris 703; Forster & Sons Ltd v Suggett (1918) 35 TLR 87; United Indigo Chemical Co Ltd v Robinson (1931) 49 RPC 178 where a process was not regarded as secret; Reid and Sigrist Ltd v Moss and Mechanism Ltd (1932) 49 RPC 461; Clark v Electronic Application (Comm) Ltd [1963] RPC 234; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136, 138; Balston Ltd v Headline Filters Ltd [1987] FSR 330; Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135; Lawrence David Ltd v Ashton [1989] ICR 123 at 133-134; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425 although the court accepted that there were no such interests here 433; PSM International plc v Whitehouse [1992] IRLR 279; Gurry 90-92; Farwell 67; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 28; Gloag 570 placed too much emphasis on the technical nature of secrets; McBryde 599 on the protection of an ongoing industrial process with reference to Commercial Plastics Ltd v Vincent; MacQueen *Stair Encyclopaedia* 1468; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 613; Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) 689 only this information was called trade secrets; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W); Christie 444.

[210]. Infra.

[211]. Homer v Ashford and Ainsworth (1825) 3 Bing 322 at 326-327; Mumford v Gething (1859) 7 CBNS 305 at 320; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453; Robb v Green [1895] 2 QB 1

afterwards [212]. It must still in each case be determined whether the information constitutes a trade secret in the particular business according to the standards set out above [213]. Courts have, on occasion, gone too far in protecting this type of information in restraint of trade cases [214], and this has been especially true of customer information. In some cases the protection of this kind of knowledge was not properly related to trade secrets [215]. In Scotland proper investigation was

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and 315; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 309; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 768; Pearks (Ltd) v Cullen (1912) 28 TLR 371 at 372; Cf Mulvein v Murray 1908 SC 528 at 532 where knowledge of area and the possibility of trade was also regarded as protectable although this was not conceptually distinguished from acquaintance with customers.

[212]. Gilford Motor Co Ltd v Horne [1933] Ch 935 at 947; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1480; Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 208; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 426, 433, 435, Cf Davies 497; PSM International plc v Whitehouse [1992] IRLR 279 at 282; Blake 655 but see the criticism supra 4.5, 670, 672ff; Farwell 67; Gurry 92-94, 94-96; Turner 75; Heydon 107; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40; A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299; Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 73; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 453-454; Malden Timber Ltd v McLeish 1992 SLT 727 at 734-735. In Malden Timber Ltd v Leitch 1992 SLT 757 at 761 counsel argued that this showed that Faccenda was qualified in Scotland but it is doubtful, 731 but see infra 5.8; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36; WAC Ltd v Whillock 1990 SLT 213 at 217; NCH (UK) Ltd v Mair 1994 GWD 34-1986; Scotcoast Ltd v Halliday 1995 GWD 7-355; McBryde 599; MacQueen *Stair Encyclopedia* 1471; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 613; Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) 689; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1105; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 436; Sibex Construction (SA) (Pty) Ltd v Injectaseal CC 1988 (2) SA 54 (T) 64; Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 456-457; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 428, 430, 429; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 442-444 with reference to Paragon Business Forms (Pty) Ltd v Yanasak.

[213]. E Worsley & Co Ltd v Cooper [1939] 1 All ER 290 at 308; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136, 138, 139-140, 136, 138; Spencer v Marchington [1988] IRLR 392 at 395; Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 59; Harben Pumps (Scotland) Ltd v Lafferty 1989 SLT 752 at 753; Hargreaves Vending Ltd v Moffatt 1990 GWD 26-1437; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1159; Aramark plc v Sommerville 1995 GWD 8-408; Premier Medical & Industrial Equipment (Pty) Ltd v Winkler 1971 (3) SA 866 (W) 869-870; U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 144; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 334-335; Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 195-196; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 487.

[214]. Millers Ltd v Steedman (1915) 31 TLR 413 at 414 although this statement is only part of the general discussion of the facts, 416; Blake 672-673; Farwell 67; Cf Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 154; A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299, Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 73, Hutchison & Craft v Burns 1994 GWD 26-1547 and NCH (UK) Ltd v Mair 1994 GWD 34-1986 although it is difficult from the short report; Woolman 258's criticism applies here; Thompson v Nortier 1931 OPD 147 at 153; Ex Parte Spring 1951 (3) SA 475 (C) 479 and the wide arguments of counsel; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 69, See the criticism: Petre & Madco (Pty) Ltd v Sanderson-Kasner 1984 (3) 850 (W) 858, Neethling (1991) 561, *Annual Survey* (1984) 130; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 404; Basson v Chilwan 1993 (3) SA 742 (A) 760, 764.

[215]. Mason 734; Herbert Morris 714-715; Putsman v Taylor [1927] 1 KB 637 at 648 with reference to Attwood 578; Gilford Motor Co Ltd v Horne [1933] 1 Ch 935 at 966-967 the court a quo is more acceptable at 947; JW Chafer Ltd v Lilley [1947] LJR 231 at 233-234; Office Overload Ltd v Gunn [1977] FSR 39 at 42; Spencer v Marchington [1988] IRLR 392 at 395; Rentokil Ltd v Kramer 1986 SLT 114 at 116; Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868; Estate Matthews v Redelinghuys 1927 WLD 307 at 314; Lewin v Sanders 1937 SR 147 at 150; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 613 and see 614; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 362; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 500; Madoo

hampered by procedural difficulties. The trade secrets concept was not properly developed in earlier cases, while the later cases are a result of the dubious approach of protecting information about customers under the guise of the customer connections notion. But it is *information* that is to be protected here. It may lead to a severe undermining of the notion that mere personal skill cannot be the object of protection if this type of information is not also rigorously tested against trade secret requirements [216].

5.8. A terminological maze: confidential information and trade secrets

Various typologies have been used to denote a plethora of different ideas. The distinction between the terms "trade secret" and "confidential information" is especially difficult. Initially courts did not clearly distinguish the two terms [217]. However, there is strong authority that they now denote different concepts.

The most effective and accurate distinction would be to use the phrase "trade secret" to mean confidential information that has a commercial dimension [218]. Courts in England and Scotland have taken a wide view of confidential information, and it is suggested that only commercial information should come into play in the restraint of trade area. The term "trade secret" was used in the narrow sense.

However, the courts have also used different further bases for distinction. Recent influential cases have reserved the term "trade secret" for information that can be protected after employment has terminated [219], while they have used the term "confidential information" in a wider sense that

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(Pty) Ltd v Wallace 1979 (2) SA 957 (T) 958; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 314; Basson v Chilwan 1993 (3) SA 742 (A) 760, 764; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 432.

216. Supra 4.5; Cf also Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 502 where the court accepted that a restraint would be for the protection of competition per se even though the employee had knowledge of customers.

217. Domanski 232; In Afrikaans the courts have not always properly distinguished between "handelsgeheime" (trade secret) and "konfidensiele inligting" (confidential information).

218. See supra 5.2.3; Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1972] RPC 811 at 822 although it was stated that trade secret was not normally used in England; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425 although some aspects of the definition of trade secrets are probably too wide.

219. Printers and Finishers Ltd v Holloway [1965] RPC 239 at 253; Faccenda Chicken Ltd v Fowler [1984] ICR 589 at 598-599; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136; Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 347; Roger Bullivant Ltd v Ellis [1987] ICR 464 at 473; Lock International plc v Beswick [1989] 3 All ER 373 at 378; Ixora Trading Inc v Jones [1990] FSR 251 at 256-259; MacQueen *Stair Encyclopaedia* 1469; Harben Pumps (Scotland) Ltd v Lafferty 1989 SLT 752 at 753; Malden Timber Ltd v McLeish 1992 SLT 727 at 731 followed in Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1158 read with 1160. Common between counsel Malden Timber Ltd v Leitch 1992 SLT 757 at 760, The court in Lux 1159 and McLeish 734 simply included both types of information under trade secrets.

includes information that can only be protected during employment [220]. This distinction will also be applied here, yet it is not unproblematic:

- In analysing older cases it must be realised that different terminologies were previously used, especially in the restraint of trade context.
- It is something of a misnomer to refer to information that is protectable during employment as being "confidential". The typology cannot be used without keeping the principles underlying the distinction in mind [221].

Courts have, in the recent cases, mostly stated that it is not only trade secrets that can be protected after termination of employment but trade secrets *or its equivalent* [222]. The *or its equivalent* addition suggests that there is information beyond trade secrets that can be protected after termination of employment.

It may be required because of a narrow interpretation of the words "trade secret". Some courts, especially in recent decisions, have used trade secrets as meaning technical secrets [223]. The courts have probably used the addition to show that technical knowledge and other knowledge that is at a similar level of confidentiality can be protected. If so interpreted, the addition will not be of much use here. A wider meaning - that is also often found in the authorities - has been given to the term "trade secret" in this work [224].

However, the addition also has a second more useful meaning. In *Malden* [225] Lord Caplan gave a wider meaning to trade secrets, but he nevertheless acknowledged that "protection will be afforded not only to what can accurately be described as a trade secret but to information of a

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[220]. Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 347; Roger Bullivant Ltd v Ellis [1987] ICR 464 at 481; Manor Electronics Ltd v Dickson [1988] RPC 618 at 624; Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 140, 141, 143; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 425 but see the discussion supra, 426, 435 where the court was critical of it; Mainmet Holdings plc v Austin [1991] FSR 538 at 543; PSM International plc v Whitehouse [1992] IRLR 279 at 281-282; Malden Timber Ltd v McLeish 1992 SLT 727 at 734-735; Malden Timber Ltd v Leitch 1992 SLT 757 at 763; Atiyah 343; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 527; Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 426.

[221]. Supra 5.3.

[222]. Faccenda Chicken Ltd v Fowler [1984] ICR 589 598-599, [1987] Ch 117 at 137; Roger Bullivant Ltd v Ellis [1987] ICR 464 at 473; Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc [1989] 1 FSR 135 at 140, 143; Lock International plc v Beswick [1989] 3 All ER 373 at 378; Ixora Trading Inc v Jones [1990] FSR 251 at 258; Mainmet Holdings plc v Austin [1991] FSR 538 at 544; PSM International plc v Whitehouse [1992] IRLR 279 at 282; It seems this is the point made by Treitel 403 and 404; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1159 although the court later only talked of trade secrets.

[223]. Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136-138 some indication that the court understood it in this narrow sense; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 528.

[224]. See Heydon 85ff.

[225]. Malden Timber Ltd v McLeish 1992 SLT 727 at 734-735; Gurry 90.

highly confidential nature equivalent to such". It might still be valuable as a general qualifier without any set meaning.

6. Interest also has to exist during employment

It is trite that the covenantee may not protect a business that was only carried on after the relationship between covenantor and covenantee is severed [226]. It has been stressed that customers who were not customers during employment cannot be protected [227].

In the older cases other reasons were given for this rule [228], but today it is probably an expression of the covenantor-related requirements for trade secrets and customer connections. The employee cannot build up acquaintance with customers or knowledge of trade secrets that did not exist during employment.

There will, however, again be important qualifications to the general applications of this rule. English and Scots courts will not look at the actual position when determining this question [229]. Judges determine effectiveness through a temporal periscope from the moment at which the restraint was concluded. The question therefore is not whether the interest actually existed during employment. The court will accept that a restraint meets this last mentioned requirement if it was foreseeable that restricted persons would be customers during employment, even when it turns out that the reasonably foreseeable scenario did not materialise.

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[226]. Not investigated Mallan v May (1843) 11 M & W 653; Davies Turner & Co v Lowen (1891) 64 LT 655 at 656; Beetham v Fraser (1904) 21 TLR 8; Chard v Hammond (1904) 48 Sol Jo 773; Caribonum Co Ltd v Le Couch (1913) 109 LT 385 at 388; See the facts Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160.

[227]. Nicholls v Stretton (1847) 10 QB 346 and the argument of counsel 350 and 354 and especially the interjections of the court at 353 in discussing Hunlocke v Blucklowe 2 Str 739, Hunlocke v Blacklowe 2 Wms Saund 156, Rannie v Irvine; The court in Nicholls v Stretton (1843) 7 Beav 42 merely enforced the restraint although it was stated that the terms of the injunction still had to be determined; Baines v Geary (1887) 35 ChD 154 and the discussion of Nicholls and Rannie; Moenich v Fenestre (1892) 67 LT 602; Dubowski & Sons v Goldstein [1896] 1 QB 478 at 483 was critical of the principle, 482 preferred the view that all customers could be protected and was critical of Baines, 484-486 rejected this principle; Lewis & Lewis v Durnford (1907) 24 TLR 64; Konski v Peet [1915] 1 Ch 530 at 539; East Essex Farmers Ltd v Holder (1926) 70 Sol Jo 1001 Konski preferred to Dubowski; Express Dairy Co Ltd v Jackson (1930) 46 TLR 147 at 149; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 960 and 962-963; Jenkins v Reid [1948] 1 All ER 471 at 481; Not really discussed in GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 but see 12; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486-487; Not discussed in Mulvein v Murray 1908 SC 528 although it should have been; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452; Scottish Agricultural Industries plc v Richard 1990 GWD 13-640; See also NCH (UK) Ltd v Mair 1994 GWD 34-1986 where the court refused to allow an interdict that concerned competing in products not dealt in; Ex parte Spring 1951 (3) SA 475 (C) 479-481 although no final stance was apparently taken, See especially the comment 479.

[228]. See infra Ch 8.5.4.

[229]. See also infra Ch 13.

In England and Scotland an interest should therefore be protectable if it did not exist at conclusion, or if it was smaller at conclusion but would foreseeably expand. However, there are limits to this. The covenantee-related aspects of trade secret and customers connections will have to be satisfied, and this will place important temporal limitations on expansion. Future expansion can only be protected if the covenantee would foreseeably be able to build up acquaintances with wider customers or if he would get to know wider trade secrets. Hence expansion would at least foreseeably have to take place during employment [230]. Any other foreseeable expansion of interests can only be protected if it was inherent in the existing interest at termination of employment [231].

It will be apparent that there are two aspects regarding the time at which an interest will (foreseeably) have to exist if this is combined with what was said earlier. The first question will be whether it was foreseeable that it would constitute an interest while the restraint is in force, and the second is that it will have to be foreseeable that an interest must exist during employment. In the case of future expansion the two requirements will act in the following manner:

- It must be foreseeable that the expansion will take place at such a time that it can exist as an interest of the covenantee against which a restraint can be set-off.
- It must be foreseeable that the restraint will come into effect during employment so that the covenantor-related aspects can be satisfied.

In South Africa the courts will determine whether an interest is reasonably protectable at the time when they are asked to enforce the restraint. Judges can therefore frequently ask whether interests existed during employment, although they will often have to make a prediction as to whether the interest will exist and expand during the duration of the restraint [232].

7. The employment must exist for long enough to enable the covenantor to get into proper contact with customers

Compliance with the covenantor-related requirements of both trade secrets and customer connections will also depend on the duration of employment. Employment will have to be for long enough to enable the covenantor to gain influence over customers or knowledge of trade secrets [233].

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230. Heydon 134-135 does not properly appreciate this.
231. Cf infra 11 and goodwill cases.
232. See infra Ch 13.
233. Cf Notes *Columbia Law Review* (1929) 29 347 at 351.

In South Africa this will be simple after *Magna Alloys*. The case will normally come to court when the relationship has broken down. The court may then look at actual duration [234]. However, the pre *Magna-Alloys*, English, and Scottish approach to the time at which reasonableness should be determined is problematic [235]. In many of these cases the court merely looked at the length of the notice period [236]. But this seems too narrow. Reasonableness will have to be determined by looking at the likely duration of employment, and this should be done less mechanically [237]. Sometimes the facts themselves may suggest solutions. In the pre-*Magna Alloys* case of *Allied Electric* [238] the restraint was concluded as part of a probationary contract. The court accepted that the parties had still only contemplated a short term relationship at this stage.

8. Interests that cannot be protected in post-employment restraints

The courts have also singled out some interests that cannot be protected in post-employment restraints. None of these interests can be utilised as a basis for justifying a restraint.

8.1. Restraints against mere competition

Freedom from competition which ex-employees might generate cannot be the basis upon which a restraint of trade can be justified [239]. A different view was initially followed in *Stewart* [240] in Scotland, but it has since been discarded [241].

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234. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1106-1107; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 259; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 511; Waltons Stationery Co (Pty) Ltd v Fourie 1994 (4) SA 507 (O) 513.

235. See the criticism of National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1106-1107.

236. Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1377; Aling and Streak v Olivier 1949 (1) SA 215 (T) 223-224; Filmer v Van Straaten 1965 (2) SA 575 (W) 579; Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 348-349; Cf also Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 259.

237. Haynes v Doman [1899] 2 Ch 13 at 26, 30; Putsman v Taylor [1927] 1 KB 637 at 643; Remington Typewriter Co v Sim (1915) 1 SLT 168 at 170, See also infra Ch 9.9. and 8.3.

238. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 332 and 334.

239. Vincents of Reading v Fogden (1932) 48 TLR 613 at 614; JW Chafer Ltd v Lilley [1947] LJR 231 at 233-234; SW Strange Ltd v Mann [1965] 1 WLR 629 at 638; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1372, 1375; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 136; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1478; The Marley Tile Co Ltd v Johnson [1982] IRLR 75 at 77; Winfield (1946) 320; Ex Parte Spring 1951 (3) SA 475 (C) 479; Oosthuizen 383.

240. Stewart v Stewart (1899) 1 F 1158 especially 1170 and 1172; Cf Eksteen JA in Basson v Chilwan 1993 (3) SA 742 (A) 762-763 accepted that it could be protected where the parties are in a position of equal bargaining but this is unacceptable, See Basson v Chilwan 1993 (3) SA 742 (A) 773 per Van Heerden JA but he did not compare analogous types of contracts, See infra 10.

241. Questioned and explained away see Giblin v Murdoch 1979 SLT ShCt 5 at 6; See also in Scotland: SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 37, Christie *Encyclopaedia* 597-598; In English law the court expressly refrained from following Stewart: Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181 at 190, Petrofina (Great Britain) Ltd v Martin [1966] 1 All ER 126 at 139 although it is wrong to state that Vancouver is the only case where a restraint was not upheld on this basis.

A restraint will mostly limit the ability of the covenantor to compete with his ex-employer [242]. Competition will be incidentally restricted when parties aim to protect another interest that is regarded as legitimate. It is a mistake to think that competition may not be restricted at all by a restraint [243]. However, the validity of a post-employment restraint may not be based *merely* on the interest which the covenantee has in reducing competition [244].

Some confusion has arisen on this point in Scotland. McBryde [245] states that it was at one time in England believed that no covenant against competition would be upheld. The author then attempts

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[242]. Routh v Jones [1947] 1 All ER 758 at 761; See Gooderson 415.

[243]. Farwell 66 must not be interpreted too strictly. Cf Vandervell Products Ltd v McLeod [1957] RPC 185 at 191.

[244]. Eastes v Russ [1914] 1 Ch 468 at 490; Herbert Morris 702; Attwood v Lamont [1920] 3 KB 571 at 578 and 589; Ropeways Ltd v Hoyle (1919) 120 LT 538 at 544; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12, 31; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 395; Bowler v Lovegrove [1921] 1 Ch 642 at 651; Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181 at 190; Putsman v Taylor [1927] 1 KB 637 at 642; Routh v Jones [1947] 1 All ER 179 at 181 and Routh v Jones [1947] 1 All ER 758 at 761; Jenkins v Reid [1948] 1 All ER 471 at 478; Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 449; M & S Drapers v Reynolds [1956] 3 All ER 814 at 818; Vandervell Products Ltd v McLeod [1957] RPC 185 at 195-196; Printers and Finishers Ltd v Holloway [1965] 1 WLR 1 at 6; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1423, 1425; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1235; Marion White Ltd v Francis [1972] 3 All ER 857 at 862; Court Homes Ltd v Wilkins (1983) 133 NLJ 698; Kirby (Inspector of Taxes) v Thorn EMI plc [1988] 1 WLR 445 at 453; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Heydon 78; Winfield (1946) 326; Treitel 402; Atiyah 341; Cheshire Fifoot and Furmston 407 quoted Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 347 the author starts with a general statement but it is limited by a quote from Herbert Morris; Gurry 214; Nelson 39 is unacceptable where the competition question is set against the interests test, 43 n42 where mere competition is perceived as a public interest issue is also unacceptable; Selwyn 385; Taylor v Campbell 1926 SLT 260 at 261; A & D Bedrooms Ltd v Michael 1984 SLT 297 at 298; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 150, 152-153; Kilgour v McNicol 1961 SLT ShCt 8 at 9; Steiner v Breslin 1979 SLT (Notes) 34 with reference to the Scottish Farmers' case; Rentokil Ltd v Hampton 1982 SLT 422 at 423; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; Rentokil Ltd v Kramer 1986 SLT 114 at 116 with reference to Scottish Farmers' Dairy; Malden Timber Ltd v McLeish 1992 SLT 727 at 731 at 733, See supra 1, Accepted in Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1157 read with 1160; Malden Timber Ltd v Leitch 1992 SLT 757 at 762 despite the criticism of counsel for the pursuer 761, 760 McLeish utilitsed by both counsels, See also 763; Gloag 570; Walker 188; Christie *Encyclopaedia* 590, 594, 595; Scott Robinson 161; Woolman 254. See also 257 although he is not correct in stating that the approach of the courts have led to the protection of competition alone; Grigson v Kinsman 1921 NLR 172 at 176; Gordon v Van Blerk 1927 TPD 770 at 773, 775; Estate Matthews v Redelinghuys 1927 WLD 307 at 311; Tilney v Rock and Way 1928 EDL 108 at 110; Thompson v Nortier 1931 OPD 147 at 152; Durban Rickshas Ltd v Ball 1933 NPD 479 at 492; Holmes v Goodall and Williams Ltd 1936 CPD 35 at 42-43; Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 502; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 3; Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 785; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W); Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258; Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402, See also 403 and 407; Rogaly v Weingartz 1954 (3) SA 791 (D) 792; Magna Alloys 904-905 and the discussion of the decision in the court a quo; Basson v Chilwan 1993 (3) SA 742 (A) 771, 772; Van der Merwe 158 was careful he merely stated that competition per se cannot *normally* be protected; Christie 443; Lubbe and Murray 258; Woker 333.

[245]. McBryde 595 with reference to Herbert Morris 708; See similarly: Office Overload Ltd v Gunn [1977] FSR 39 at 41, Whish *Stair Encyclopaedia* 1209.

to show that such restrictions have since been accepted both in England [246] and Scotland [247]. But he is mixing two different issues. The cases that McBryde endeavours to contradict concern the question whether freedom from competition as an interest can be restricted, while the cases which he utilises for answering this point pertain to the form which a restraint clause may take. A particular formula for a restraint of trade clause has, especially in Scotland, been called a "restraint against competition" [248].

A distinction has also sometimes been drawn between fair and unfair competition [249], but this distinction should not be taken too far. Unfair competition has merely meant interference with competition that is not justified by a proprietary interest. Protection against unfair competition in the wider sense might not be irrelevant [250], but it has not played an independent role in establishing protectable interests. In *Tension Envelopes* [251] the covenantee used very specialised employees. There were no people trained in this field in South Africa, and workers had to be imported from Germany. Moreover, the covenantee was involved in very destructive and acrimonious competition with another company which apparently attempted to filch its hard-gained employees. But the court still did not allow a restraint that would merely restrict an employee from working for such a competitor. This is correct if it is considered that it is not the employee who is competing unfairly with the covenantee. But even more direct unfair competition by the covenantor will probably not be regarded as a basis for protection per se.

8.2. Restraints against the use of personal skill, knowledge and other personal attributes

The courts have steadfastly refused to accept the effectiveness of restrictions that inhibit employees in the use of their personal skill, knowledge and other personal attributes [252]. The

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246. Fitch v Dewes [1921] 2 AC 158.

247. Especially Scottish Farmer's Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 152, 153.

248. Infra Ch 8.5.2; See especially Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 152; This is probably how Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 487 must be interpreted.

249. Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394; Dickson v Jones [1939] 3 All ER 182 at 189; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503

250. Infra 9.12.

251. Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W).

252. Contra Eastes v Russ [1914] 1 Ch 468 at 486 although it was not done expressly. Cf 490 where Phillimore J confusingly talked of personal knowledge of customers as a legitimate interest; Mason 734; Attwood v Lamont [1920] 3 KB 571 at 589-590 and 596; The Court of Appeal in Putsman v Taylor [1927] 1 KB 741 upheld the whole of the restraint. The judgment is very short but it emphasised that the covenantor had a well known reputation. This cannot in itself be the basis for protection. The Kings Bench decision is more acceptable; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394; Routh v Jones [1947] 1 All ER 179 at 181; See also Electric Transmission Ltd v Dannenberg (1949) 66 RPC 183 it was not discussed, See Chitty 1204, Heydon 107 this distinction would have provided the easiest solution to the case; Cf Clark v Electronic Applications (Commercial) Ltd [1963] RPC 234 at 236 with reference to Pilkington Bros Ltd v Proctor (unrep); Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1376-1377; Commercial Plastics Ltd v

concept of personal skill will play a dual role. It will be important in defining the interests that can be protected. It was shown above that it will play a role in the delineation of both trade secrets and customer connections [253]. But the concept of personal skill will not only be relevant on a definitional level. A restraint will not be effective where it *merely* restricts the personal skills of the covenantor, although the courts have not been as careful in formulating this principle as they have been in outlining the same idea with regard to protection against competition.

8.3. Restraints against protecting investment in human skills

It will also not create protectable interests where some investment has been made in improving the skills or in enhancing the earning capacity of the employee. It is settled in England and Scotland that the covenantor may not be restricted from performing certain acts that will be detrimental to the business of the covenantee merely because he acquired skill or personal knowledge during employment [254]. The covenantee does not get to own the skill and aptitudes of the covenantor merely because he has assisted the covenantor in acquiring them [255]. In *Hepworth* [256] an actor was restricted from using a pseudonym that had been devised and developed by the actor in tandem

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Vincent [1965] 1 QB 623 at 640; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401; Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 390; Anson 325; Atiyah 341; Cheshire Fifoot and Furmston 401; Farwell 66; Cf the discussion of AL Corbin *Corbin on Contracts* 1394 by Heydon 105-106; Winfield (1946) 326; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; Gordon v Van Blerk 1927 TPD 770 at 773, 775, 776; Estate Matthews v Redelinghuys 1927 WLD 307 at 311; Durban Rickshas Ltd v Ball 1933 NPD 479 at 492; Aling and Streak v Olivier 1949 (1) SA 215 (T) 220; Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 501 at 502 cannot be accepted. The court suggested that the restraint might have been reasonable on the basis that the employee was trained in Europe; Filmer v Van Straaten 1965 (2) SA 575 (W) 579; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 347 with reference to Cheshire Fifoot and Furmston supra, 354; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 245; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C); Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198, 200-201; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 486, 503-504; Basson v Chilwan 1993 (3) SA 742 (A) 772-773, 778 "ordinarily" these interests cannot be protected, 779; Christie 444; Kerr 508; See supra 5.2.2 and infra 8.3.

253. Supra 5.2.2.

254. Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 773-774; Herbert Morris 704-705, 710, 717; Mason 740-741; Ropeways Ltd v Hoyle (1919) 120 LT 538 at 542, 544; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 24; Gilford Motor Ltd v Horne [1933] Ch 935 at 947; Triplex Safety Glass Co v Scorah [1938] Ch 211 at 215, 216; Routh v Jones [1947] 1 All ER 179 at 181; Routh v Jones [1947] 1 All ER 758 at 761; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 239; SW Strange Ltd v Mann [1965] 1 WLR 629 at 638; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1229; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 400; Anson 325; Atiyah 341; Cheshire Fifoot and Furmston 401; Chitty 1204; Heydon 118-119; Heydon *McGill* 336; Winfield (1946) 326; Selwyn 385; Cf Mulvein v Murray 1908 SC 528 at 532 was decided before Mason and it must be approached with caution; Minimax Ltd v Geddes (1914) 31 ShCt Rep 36 at 39; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; It was common cause between the parties in Malden Timber Ltd v McLeish 1992 SLT 727 at 731 accepted Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1158 read with 1160, The exposition of principles was also relied on in Malden Timber Ltd v Leitch 1992 SLT 757 at 760 the submissions were utilised by both parties; Walker 188.

255. Infra 16.

256. Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 15-16, 18-19.

with the producer who employed him. The court accepted that this pseudonym was not a proprietary interest in the hands of the producer even though the contract expressly provided that it would be. It was accepted that the restraint was part of the personal make-up of the covenantor, and it was acknowledged that investment made in the promotion of the covenantor did not transform the name into a proprietary interest for the employer [257].

In *Magna Alloys* [258] there are some indications in the discussion of the facts that the court saw investment in training as one of the aspects that determined reasonableness. However, the case cannot serve as authority for such a radical departure from traditional restraint of trade principles:

- It was not strongly suggested if it was suggested at all.
- A different view was taken in most other South African cases before and after *Magna Alloys* [259].
- Investment in human capital is not a proprietary interest, and it will be contended that the proprietary interest notion is still the safest foundation for recognising protectable interests [260].

An employer must be able to protect his investment in the improvement of employees, but it cannot be done by simply concluding a post-employment restraint [261]. It will often happen that the employer will be able to protect his investment in human capital by relying on another legitimate interest [262], and investment in human capital will be one of the factors that will influence the attitude of the court when approaching the reasonableness of a restraint [263]. But other techniques will have to be used where this is not so [264].

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257. Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 22.

258. Magna Alloys 904-905; It played some role in Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 544; Some dicta in Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) are also too wide; Cf also Fisher v Salon Mystique 1995 (2) SA 136 (O) 141. The court a quo relied on this. Van Coller J on Appeal accepted that the case could not be resolved by relying on investment in time and attention given to the employee as it was not properly pleaded but reliance on this issue was not attacked on the merits. Some arguments are confusing.

259. Gordon v Van Blerk 1927 TPD 770 at 773, 775; African Theatres Ltd v D'Oliviera 1927 WLD 122 at 129; Estate Matthews v Redelinghuys 1927 WLD 307 at 311; Tilney v Rock and Way 1928 EDL 108 at 110; Thompson v Nortier 1931 OPD 147 at 152; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 347; Highlands Park Football Club Ltd v Viljoen 1978 (3) 191 (W) 200-201; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 76-77; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 259 although it was related to granting of an interdict; Bonnet v Schofield 1989 (2) SA 156 (D) 159; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503-504, 507-508; Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402, See also Basson v Chilwan 1993 (3) SA 742 (A) 407; Schoombee 142-143; Christie 444 and Kerr 508.

260. Infra 16.

261. Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 76; Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402.

262. Infra 16.2 especially the criticism of Kales 195.

263. Blake 652-653; Heydon 106 with reference to Forster & Sons Ltd v Suggett (1918) 35 TLR 87 although it was not clearly expounded in the case; See infra Ch 9.

264. Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402.

- The covenantor may be bound to a long employment contract.
- Employers may require that an employee buys himself out of the employment to compensate for investment made in him [265].

9. Sale of business [266]

Restraints in sales of businesses that restrict the seller after the sale have also come before the court with considerable frequency. These types of contracts can therefore also be described as classical.

10. Protection against competition in sale of goodwill cases

Some authorities hold that competition can be restricted in sales of business cases [267], or that competition can be restricted in a sale of business but not after the termination of employment [268]. This may create the impression that competition per se is protectable in sale of goodwill cases. But statements to this effect can be misleading [269]. It is more acceptable to see its protection as being incidental to the guarding of the more specific proprietary interest, goodwill [270]. Competition is not the ultimate object of protection. Protection against competition has been closely tied up with

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[265]. Strathclyde Regional Council v Neil 1983 SLT ShCt 89.

[266]. See also: William Fraser & Son v Renwick 1906 SLT 443; Rodger v Herbertson 1909 SC 256; George Walker & Co v Jann 1991 SLT 771 at 773 discussed infra Ch 1; Dunman v Trautman (1891) 9 SC 24; Coetzee v Eloff 1923 EDL 113.

[267]. Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 272; Whitehill v Bradford [1952] 1 Ch 236 at 246; Office Overload Ltd v Gunn [1977] FSR 39 at 41; There is the implication in Dumbarton Steamboat Co Ltd v MacFarlane (1899) 1 F 993 at 997; Weinberg v Mervis 1953 (3) SA 863 (C) 868 relied on by Kerr 209; Basson v Chilwan 1993 (3) SA 742 (A) 773.

[268]. Empire Meat Co Ltd v Patrick [1939] 2 All ER 85 at 92; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 238; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1372; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1229; Halsbury 3rd ed vol 38 25-26; Blake 643; Treitel 404; Scottish Farmer's Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 150; Gloag 570; Forman v Barnett 1941 WLD 54 at 60ff; Aling and Streak v Olivier 1949 (1) SA 215 (T) 220; Cowan v Pomeroy 1952 (3) SA 645 (C) 650 and the suggestions of counsel; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198; Kerr 508; Oosthuizen 383 although there is some indication that he was sensitive to the fact that goodwill is the underlying interest.

[269]. Heydon 185.

[270]. Herbert Morris 701-702, 708-709; Vandervell v McLeod [1957] RPC 185 at 190; Kirby (Inspector of Taxes) v Thorn EMI plc [1988] 1 WLR 445 at 452-453; Anson 322-323; Atiyah 340; Treitel 402; Walker 187; Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 785; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) especially 234, 236 and 240 stressed that protection of competition depended on a proprietary interest; Christie 442-443; Cf also Van Heerden AJA in A Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A) 417-419. The terminology used in the justification of implied protection in sale of goodwill cases cannot be accepted. He called interference with goodwill other than solicitation of customers indirect interferences with goodwill and he stated that this was interference by competition per se; Van der Merwe 155; Schoombee 132.

the protection of goodwill sold [271]. These statements mean that it will generally be sufficient in sale of business cases to show that it is a restraint against competition, because goodwill mostly justifies protection against competition.

11. Protection of goodwill

Courts have accepted that the protection of goodwill lies at the heart of these sale of business cases [272]. Goodwill as such will be a legitimate interest in sale of business cases [273]. The buyer can protect the customers and the ability of the business to attract custom against interference from the covenantor [274]. Business connections can also be protected in sale of business cases. But much wider interests are also at stake. Goodwill and customer connections must therefore be distinguished [275]. A customer connection is only an aspect of goodwill [276]. It is acceptable to

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[271]. The notion of restriction of competition was already tied up with the promotion of transferred interests in Leather Cloth Co v Lorsont (1869) LR 9 Eq 345 at 354; Mason 737; Attwood v Lamont [1920] 3 KB 571 at 589-590; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 270; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; Trebilcock 260, 266-267; Christie *Encyclopaedia* 591; McBryde 600-601; Gordon v Van Blerk 1927 TPD 770 at 773-774; Estate Matthews v Redelinghuys 1927 WLD 307 at 311-312; Estate Fisher v Bradley 1931 CPD 46 at 48; Durban Rickshas Ltd v Ball 1933 NPD 479 at 492; Wilkinson v Wiggill 1939 NPD 4 at 13, Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 281; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 435.

[272]. Supra 10 and infra 16.

[273]. Goodwill concept was already utilised: Archer v Marsh (1837) 6 Ad & El 959 at 967, Elves v Crofts (1850) 10 CB 241 at 260, Avery v Langford (1854) 1 Kay 663 at 665, Nordenfelt 548; Herbert Morris 701 and 708; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 575 with reference to Herbert Morris; D Bates & Co v Dale [1937] 3 All ER 650 at 654-655; Connors Bros Ltd v Connors [1940] 4 All ER 179 especially 192 and 194-195, 193 should not be interpreted too narrowly; Vandervell Products Ltd v McLeod [1957] RPC 185 at 190; Kirby (Inspector of Taxes) v Thorn EMI plc [1988] 1 WLR 445 especially 452-453; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; Anson 322; Cheshire Fifoot and Furmston 411-412 where the court stressed proprietary interest and the protection of a business although goodwill was not specifically mentioned; Atiyah 340; Chitty 1198; Collinge 420; Davies 491; Treitel 402; Already recognised in a minority judgment in Scotland in Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1113; Whish *Stair Encyclopedia* 1209; Durban Rickshas Ltd v Ball 1933 NPD 479 at 492; Forman v Barnett 1941 WLD 54 at 60; Schwartz v Subel 1948 (2) SA 983 (T) 988-989; Wohlman v Buron 1970 (2) SA 760 (C) 763; Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 785; Lubbe and Murray 260 with reference to HJO Van Heerden and J Neethling *Die Reg Aangaande Onregmatige Mededinging* (1983) asked whether these interests are protectable.

[274]. On the meaning of goodwill see: Churton v Douglas (1859) Johns 174; Inland Revenue Commissioner v Muller & Co's Margarine Ltd [1901] AC 217 at 223-224; Kirby (Inspector of Taxes) v Thorn EMI plc [1988] 1 WLR 445 at 453; Trebilcock 260, 266-267; *Green's Encyclopaedia* vol 7 465ff, Coetzee v Eloff 1923 EDL 113 at 115-116; A Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A) 417; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 232 with reference to Inland Revenue Commissioner v Muller & Co Margarine Ltd [1901] AC 217 at 234 and In re Brown 242 NY 1 at 6 per Cardozo J; Coin Sekerheidsgroep (Edms) Bpk Ltd v Kruger 1993 (3) SA 564 (T) 573; Botha v Carapax Shadeports (Pty) Ltd 1992 (1) SA 202 (A) 211-212; Neethling (1991) 212 on the so-called "reg op werfkrag"; Lubbe and Murray 260.

[275]. There can be goodwill without customer connections Luck v Davenport-Smith [1977] EG 73 at 89; Cf Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 240-241 where goodwill was related to the protection of trade secrets this is also unnecessary; Trebilcock 93 accepted that there was some confusion in this area; Botha v Carapax Shadeports (Pty) Ltd 1992 (1) SA 202 (A) 212 is not always satisfactory; Rautenbach & Reinecke 555 stated that goodwill may lie at the foundation of most protectable interests but not all goodwill will always be protectable.

describe the positive attitudes of customers towards a business as "goodwill" [277]. But it is imprecise [278] to say that it is goodwill that may be protected when customer connections are meant [279]. It is even more unacceptable to aver that goodwill, in the wide sense, can be protected in post-employment cases [280].

Heydon [281] contended that only customer connections and trade secrets can be protected in sale of business cases. But this is not supported by the authorities. Only *Pellow* [282] is open to such an interpretation, yet this case has not been followed. Heydon is not able to draw his approach through consistently [283]. He comes very close to accepting the view expressed here, but he struggles to cut the gordian knot because he uses false conceptual tools.

12. The protection of trade secrets in sale of business or sale of trade secret cases

Parties to a sale of a business will seldom rely on the protection of a trade secret because:
- Trade secrets are seldom transferred in these cases.

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276. Marion White Ltd v Francis [1972] 3 All ER 857 at 862 quoting Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1228; GFI Group Inc v Eaglestone [1994] FSR 535 at 542; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 502, 509.

277. SW Strange Ltd v Mann [1965] 1 WLR 629 at 640-641; Gurry 210; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 37; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 510-511; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 444 the court referred to Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 542.

278. Routh v Jones [1947] 1 All ER 758 at 760 where the court accepted that it did not use the word accurately.

279. The court a quo in Whitmore v King (1919) 119 LT 533 stressed that a restraint was made for the protection of goodwill and was part of the goodwill; Fitch v Dewes [1921] 2 AC 158 at 164, 168; Dickson v Jones [1939] 3 All ER 182 at 189; Cf Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 there was a qualification in the restraint that customers could only be solicited in so far as it interfered with goodwill but that will not add much to validity of the clause; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 12 this might lie at the basis of some dicta that are too wide, Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1228, 1229; Spencer v Marchington [1988] IRLR 392 at 396; Briggs v Oates [1991] 1 All ER 407 at 409; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452; Walker 187 in his discussion of sale of business restraints mentioned goodwill but he incorrectly equates this to business connections; Aling and Streak v Olivier 1949 (1) SA 215 (T) 220 although the dictum can also be interpreted more narrowly; Rogaly v Weingartz 1954 (3) SA 791 (D) 794; Nachtsheim v Overath 1968 (2) SA 270 (C); Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 74; Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 350.

280. Hitchcock v Coker (1837) 6 Ad & E 438 454 the emphasis on goodwill will be unacceptable today; The emphasis in Pieterse v Cilliers 1945 (2) PH A.31 53 at 53-54 cannot be accepted; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 573; The confusion in the arguments of counsel in Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 403 was correctly rejected by the court.

281. Heydon 184 et seq.

282. Pellow v Ivey (1933) 49 TLR 422, Cf Durban Rickshas Ltd v Ball 1933 NPD 479 at 489 where Pellow was emphasised in the application of law to facts. A more acceptable view was taken in the theoretical discussion; Cf Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1229 although the case is not clear.

283. Heydon 186 and 192.

- Goodwill may accompany secrets, and wider protection can often be obtained if goodwill is simply relied on as the protected interest [284].

Still, there are cases where restraints in sales of businesses have been upheld on the basis that they are aimed at protecting trade secrets [285], and there are cases where the separate protection of trade secrets has played an important role [286]. This issue will often come to the fore where the strongest or only element of sale is an important trade secret [287]. However, in the last mentioned type of case one should perhaps talk of a sale of a trade secret rather than a sale of a business.

Systems Reliability [288] even suggested that wider protection of information will be possible in sale cases. It will be noted from the discussion above that the court in *Faccenda* [289] accepted that only trade secrets proper could be protected by restraint. However, Harman J contended that this limitation will not apply in sale of information cases because the information itself is sold. But what distinguishes a trade secret from other confidential information is that it is a proprietary interest and not mere personal skill and knowledge. It is impossible to see how the proposition that the sale of information should change its legal status can be justified.

13. Seller-related aspects in sale of business restrictions

Goodwill - and sometimes trade secrets - are the object of protection in sale of goodwill cases. But the buyer cannot protect any goodwill or trade secret that he holds against the seller. The covenantor must have been the seller of the trade secret or goodwill that is protected [290]. The covenantor cannot be restricted from interfering with goodwill or trade secrets that the covenantee already has or will obtain in future from another source.

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[284]. Turner 116-117; Pellow v Ivey (1933) 49 TLR 422 contended that trade secrets will receive wider protection but see the criticism supra 11.

[285]. Bryson v Whitehead (1822) 1 Sim & St 74; Hagg v Darley (1878) 47 LJCh 567; Heydon 185.

[286]. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 384ff.

[287]. Cf Maxim-Nordenfelt Guns and Ammunition Co Ltd v Nordenfelt [1893] 1 Ch 630 at 660 where the court argued that restrictions in sales of trade secrets should even fall outside the doctrine. Christie *Encyclopaedia* 596; Turner 117; Winfield (1946) 326; Cf the example in the minority judgment Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1113.

[288]. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 384.

[289]. Supra 5.

[290]. Nordenfelt 540-541; Mason 737; Herbert Morris 708; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 575 although the court did not clearly rely on goodwill as an interest, Cf also the rejection of Smedley's Ltd v Smedley (note added to the case); D Bates & Co v Dales [1937] 3 All ER 650 at 654-655; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; Treitel 402; Gloag 572; McBryde 601; Walker 187.

The courts should not, however, take a rigorous view of goodwill as at the time of transfer. Included in goodwill is its ability to expand [291], and this will also be protectable [292]. It has been acknowledged that the buyer can protect himself from competition by the seller in respect of more than the existing customers [293]. This point is correct, although it would be more acceptable to describe it with reference to the object of protection, namely goodwill [294]. Hence, expansion of goodwill that was not inherent in the goodwill as and when it was sold should not be protectable [295].

This principle does not constitute a breach of the rule in English and Scots law that the restraint must be judged at the time of the conclusion of the contract [296]. The court will not ask whether actual expansion has occurred; it will simply inquire whether it was foreseeable that the goodwill itself would expand. In South Africa, the principle that the validity of a restraint should be determined at the time at which the court is asked to enforce the restraint, may cause some difference in application. But the time principle mostly will be less important than in post-employment cases. Sales of goodwill will often come before the court before future development has taken place. Only the point of departure will differ. The courts will allow the restraint if they can predict that future expansion will take place and if they are satisfied that it will be an expansion of the goodwill as sold.

Wider protection of future expansion will be possible in sale of business cases than in post-employment cases, because goodwill will often have great inherent potential for expansion. Conversely, expansion possibilities will be wider in post-employment cases, because expansion

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[291]. See outside the doctrine: Maxim's Ltd v Dye [1977] 1 WLR 1155 at 1160, My Kinda Bones Ltd (t/a Chicago Rib Shack) v Dr Pepper's Stove Co Ltd (t/a Dr Pepper's Manhattan Rib Shack) [1984] FSR 289 at 315.

[292]. Trebilcock 241; Treitel 403, Gooderson 421-422 with reference to Lamson Pneumatic Tube Co v Phillips (1904) LT 363 although it deals with a post-employment covenant; Olds v Tollgate Holdings Ltd 1970 (4) SA 343 (T), Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 107-109; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 232-233.

[293]. Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64-65; All future expansion provided for by Articles of a Company cannot be protected Dumbarton Steamboat Co Ltd v MacFarlane (1899) 1 F 993 at 997 and 998; Weinberg v Mervis 1953 (3) SA 863 (C) 867-868, and 870, See Heydon 186 although he took an incorrect view of the object of protection in these cases; Kerr 509, 517; Lubbe and Murray 261; Weinberg v Mervis 1953 (3) SA 863 (C) 868, See also 870; Cf in partnerships: Lindley 10-179, Anthony v Rennie 1981 SLT (Notes) 11 at 12 although heavy weather was made of explaining a completely wrong interpretation of Macfarlane v Kent [1965] 2 All ER 376.

[294]. Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 107-109.

[295]. Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64-65; Heydon 186-187 although his view is muddled, see the criticism supra; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 232-233 although it did not always clearly distinguish earnings as a means of valuing goodwill and the future ability to attract customers, See also 236, Cf also the criticism of 239 infra Ch 8.5.2.

[296]. See infra Ch 13.

during employment can be protected while there is not such an interim period in sale of goodwill cases.

14. Interests that cannot be protected in sale of business restraints

Mere competition is not a legitimate interest in sale of business cases [297]. Personal skill, as such, also may not be protected here [298]. Wider interference than with post-employment restraints will however be possible, as a result of the wider scope of goodwill protectable here.

15. Interests in another business to the one that the employee works in or the one that is sold

Some authorities have stated that the covenantee may not normally protect the interests of another business in which he has an interest, but in which the covenantor was not employed in a post-employment restraint case [299] or with which the seller did not have a connection in the case of sale of a goodwill restraint [300]. But this test might produce nice problems, especially in post-employment cases. It was of greater importance in pre-*Mason* law when narrower principles had not yet developed, but it has now become obsolete. The problems discounted by it can be more accurately accommodated within the requirement that legitimate interests only will be protected.

Yet, it will not be wrong to continue to apply this test, as long as some care is taken. In *Henry Leetham* [301] the employee worked for one particular company. It was contended by the employer that the covenant had been concluded for all or any of the companies in a group. The test that is discussed here was applied, but the court merely equated company law divisions with business divisions. The question whether "another business" was being protected was not really addressed. Today it might often be that the business in which the employee works is operated by more than one company. In such cases fastidious reliance on formal divisions will be unrealistic. The result in *Henry Leetham* is probably correct, but the court could have been more careful in achieving it.

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297. Supra 8.1.

298. In so far as Attwood v Lamont [1920] 3 KB 571 at 589 is open to this view it cannot be accepted. See Turner 114; See Turner, 117, 118 and 119-120 with reference to Kerchiss v Colora Printing Inks Ltd [1960] RPC 235.

299. Morse v Fowler (1899) 44 Sol Jo 89; Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 322 especially at 327. See Winfield (1946) 327; Bromley v Smith [1909] 2 KB 235 at 241 although the other business protected was a future business; Anson 326; Chitty 1208; Christie 442; Kerr 510.

300. British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 576-577 and the discussion of Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 322 at 326.

301. Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 322 at 326-327, Cf the different view of the facts a quo Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 189 and the reservations of Neville J will disappear when current law is applied even if the approach followed on appeal is not applied.

16. The principles underlying the protection of the hitherto recognised interests

There is at least some infringement of freedom of work where a contract falls within the doctrine. The aim of the restraint of trade doctrine is to protect the ability to work, as an important public policy value, against infringement in cases where it does not constitute a net benefit to the community. The question in these cases will accordingly be whether such net benefit exists. The courts have had to translate economic acumen and social policy into legal principles, and they have addressed the conflicts between legal principles within the broad milieu of public policy.

Judges have found that the most convenient starting point for determining whether infringement is justified is the interests of the covenantee. They have accepted that it is economically necessary that certain interests be protected [302], and they have delineated interests that can, in terms of public policy [303], be regarded as justifying infringements with freedom of work. The freedom of work principle has been regarded as so important that the courts have been slow to recognise that any interests of the covenantee may justify interference with it. Only interests that are of clear social and economic importance have been allowed. But is there a general principle that underlies all protectable interests?

It might be argued that confidentiality and acquired knowledge is the basis for protection. There is also some historical justification for this [304]. But the principle would be both too wide and too narrow. Confidentiality in its widest sense has not been protected as it stifles personal skill and knowledge to an unacceptable degree, while other interests that cannot be directly related to confidence have been regarded as protectable.

It might be argued that broad market-related principles should lie at the basis of protectable interests. But the role of free-market notions in the area of restraint of trade should not be over-estimated [305]. It will promote protectability where it is shown that the legal guarding of a certain interest would promote the free market. Yet it will not be conclusive.

Only one yardstick has been consistently used. It has been often stated in post-employment and sale of goodwill cases that only proprietary or exceptional proprietary interests will be protectable

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302. Homer v Ashford and Ainsworth (1825) 3 Bing 322 at 326-327.
303. Petrofina (Great Britain) Ltd v Martin [1966] 1 All ER 126 at 139 see however the criticism infra; Blake 650-651.
304. Lubbe and Murray 260-261; See supra 4.5 on the notion that confidentiality also underlies customer connection.
305. See supra Ch 3.6.2.

[306] (although it might be more precise to talk of patrimonial interests in South Africa [307], and perhaps also in the other legal systems), while mere commercial interests cannot be the object of protection in the traditional cases [308]. In Cheshire Fifoot and Furmston [309] it is said that a proprietary interest or some other legitimate interest such as a right to work must be proved by the covenantee, but proprietary interests of the covenantee are here balanced against the right to work of the covenantor. The interests of the two parties are confused. What the covenantee has to prove is that there is an interest that will *counterbalance* the infringement.

The courts have drawn an analogy with the concept of property. But it is not property in the sense of the law of things that is normally regarded as legitimate interests. Hence, it is difficult to

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[306]. Mason 740-741 started to compare protectable knowledge to "possession of material goods"; Herbert Morris 710, 713, 714; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 15, 25, 34, See also the basis on which arguments were put forward 8-9; Attwood v Lamont [1920] 3 KB 571 at 590; Putsman v Taylor [1927] 1 KB 637 at 642; Triplex Safety Glass Co v Scorah [1938] Ch 211 at 215; Routh v Jones [1947] 1 All ER 179 at 181, 183; M & S Drapers v Reynolds [1956] 3 All ER 814 at 815; Vandervell Products Ltd v McLeod [1957] RPC 185 at 192; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 344; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 281; George Silverman Ltd v Silverman (1969) 113 Sol Jo 563; Cheshire Fifoot and Furmston 400, 401 and 407; Chitty 1198, 1203, Cf also 1212 stated that a restraint in a sale of business is necessary to create a "property right". It is probably less confusing to talk of proprietary interests; Collinge 420; Heydon 85, 261, 264; Trebilcock 67-70; Winfield (1946) 326; Treitel 402, 404, 405; The argument of counsel Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 72; Rentokil Ltd v Kramer 1986 SLT 114 at 116; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90 counsel for the defender argued against a restraint as it attempted to "protect a proprietary interest in the professional skills of the covenantee". This is an unacceptable merger of concepts; Christie *Encyclopaedia* 595; Scott Robinson 161; Walker 187; Woolman 254; Gordon v Van Blerk 1927 TPD 770 at 774, 775 and 776; Estate Matthews v Redelinghuys 1927 WLD 307 at 312; Tilney v Rock and Way 1928 EDL 108 at 110; Holmes v Goodall and Williams Ltd 1936 CPD 35 at 42; Aling and Streak v Olivier 1949 (1) SA 215 (T) 220 referred to in Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 501; Ex Parte Spring 1951 (3) SA 475 (C) 478; Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W) 310; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 2-4; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 347-348 with reference to Cheshire Fifoot and Furmston, 349, 353; Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 349; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 67; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 500; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 200; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 358, 362; Petre & Madco (Pty) Ltd v Sanderson-Kasner 1984 (3) SA 850 (W) 858-859; Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 687; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 502, 503; See the remarks Basson v Chilwan 1993 (3) SA 742 (A) 769; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 541; The Concept Factory v Heyl 1994 (2) 105 (T) 112; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 442; Christie 443 and 444 stated this aspect "may still be relevant"; Lubbe and Murray 258; Schoombee 140 although the author did not distinguish proprietary and commercial interests; Cf Collinge 410 stated that the courts do not really want to weigh the different issues and that they therefore merely hide behind proprietary interests but Collinge did not take a proper view of the principles underlying the doctrine.

[307]. Malan v Van Jaarsveld 1972 (2) SA 243 (C) 245, Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 687; Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 511; Van der Merwe 158; Cf Domanski 442; Cf Otto 209 he merely talked of "substantive interests"; Rautenbach & Reinecke 555.

[308]. Heydon 85 and the reference to Treitel (3rd ed) 382; Heydon *McGill* 339-341 especially the analysis of Bray CJ in Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Ltd; Treitel 405, 419 although he thought that some extension may be possible; It might be protectable in newer types of restraints see e.g. Lord Wilberforce in Esso 340, Heydon *McGill* supra but this has not always been properly distinguished from traditional cases: Collinge 419; Schoombee 140.

[309]. Cheshire Fifoot and Furmston 406.

interests have been protected merely because it can be shown that it might in some direct or indirect manner actually promote the ability to work. The clearest proof of this is that the courts have thus far refused to protect investment in human capital in employment cases [314]. It will probably go some way towards showing that an interest is proprietary if it can be shown that it will merely undermine the principles underlying the doctrine if protection is not allowed. However, the principle cannot stand on its own feet. It is too vague and uncertain. Courts must not be buffeted about by the decisions of commercial men. They must also lay down the principles for acceptable behaviour in the market-place. The notion that only proprietary interests should be protected is indispensable for that purpose.

- Similarly, it has been argued in sale of goodwill cases that a covenant will be acceptable if it ensures that the covenantee will realise the best price in the contractual exchange [315]. However, this again cannot be a principle underlying the recognition of interests. It has been acknowledged that this tenet does not apply in post-employment cases [316]. A restriction in a sale of business case will not be allowed merely because it will realise a higher price. Protection against mere competition will still not be protectable even if paid for. This justification again presupposes that protectable interests are determined on another ground. It is merely an additional justification for allowing the protection of proprietary interests. It may again play a role in showing that an interest is proprietary and the courts have utilised this argument in justifying refusal to investigate directly the interests of the covenantor [317]. But it cannot be of wider relevance.

Cheshire Fifoot and Furmston 400; Christie *Jur Rev* 287, 302, 303; Christie *Encyclopaedia* 583; Herbert Morris 701 quoted with approval in Holmes v Goodall and Williams Ltd 1936 CPD 35 at 41; Filmer v Van Straaten 1965 (2) SA 575 (W) 579; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 236 referring to Nordenfelt 552 and Diner; Comments (1951) *University of Chicago Law Review* 19 97 at 101 and see similar arguments in employment cases; Notes (1929) 29 *Columbia Law Review* 347.

[314]. Supra 8.3; See also the criticism Notes "Enforceability of contracts not to compete after a term of employment" (1928) 28 *Columbia Law Review* 81 at 85ff.

[315]. Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 90; Herbert Morris 707; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394 with reference to Herbert Morris 707; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 270, See Trebilcock 232; Bridge v Deacons [1984] AC 705 at 713; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 382; Anson 323; Atiyah 340 although he clearly discussed it in terms of property; Kales (1917) 198; Giblin v Murdoch 1979 SLT ShCt 5 at 6; McBryde 601; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 435; This aspect was apparently also stressed by Lubbe and Murray 260; See Woker 333 in the light of the Bill of Rights in the Interim Constitution in South Africa.

[316]. Infra; Cf however Trebilcock 125-129.

[317]. Infra.

- Treitel noted that protectable interests are all, to some extent, protectable ex lege [318]. He creates the impression that this lies at the base of the notion "proprietary interest". But this is not acceptable. Customer connections in post-employment cases will not be protected ex lege though they might be proprietary. Goodwill in a sale of business will be proprietary but it will not be ex lege protectable as a whole [319]. It will show that an interest is proprietary if it is also protected without a restraint, but the concept "proprietary interest" is also wider than the protection of such interests.
- Rautenbach and Reinecke in South Africa suggest that the interests protectable here are merely those that will be protected ex delicto on the grounds of unfair competition [320]. But the position between the parties is refined by the contract. Sometimes more and sometimes less has been protected. The principles of unlawful competition may be utilised to clarify some notions in this area, but the two fields cannot be equated. The examples mentioned by the authors concern the only areas in which they overlap.

In *Sir WC Leng* [321] it was argued that bona fides, to an extent, forms the basis for protection. The exposition in this case is narrow, as the court equated bona fides with confidentiality [322]. But it can be asked whether a wider concept of bona fides - especially in South Africa - should not be regarded as lying at the basis of the interests that can be protected [323]. It might not lead to the protection of vastly different interests. The proprietary interest question will probably still be central to the investigation of bona fides. But it might infuse flexibility into restraint of trade law, and theoretically it might be more in accordance with standard contract law principles.

16.1. Relative proprietary interests

No consistent theoretical pattern for the description of proprietary interests emerges from the cases.

- It may be accepted - whether the three terms are used in a wider or narrower sense - that trade secrets, trade connections, and goodwill only have to meet covenantee-related requirements before they constitute proprietary interests. However, this would necessitate

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318. Treitel 405.
319. Heydon 264-265.
320. Rautenbach & Reinecke 561.
321. Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 774.
322. Blake 668-669 mentioned in Lubbe and Murray 260 suffers from a similar defect.
323. In South Africa Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 335, Domanski 233ff emphasised bona fides as the principle underlying the ex lege protection of trade secrets.

further narrowing down. These kinds of quasi-property will only be protectable under certain circumstances [324].

- A narrower view of proprietary interest can be taken. Here customers over whom the employee has acquired influence, and trade secrets of which the employee has gained knowledge, will be proprietary in post-employment cases. Only goodwill as sold will be a proprietary interest in sale of business cases.

It is difficult to determine which of the two possibilities is preferable. It is perhaps no more than a matter of semantics, but this question might be important to the consistent application of the doctrine and the further development of legitimate interests. The second approach accords more with the general methodology in restraint of trade cases. Protection here is relative to a particular relationship. This relational dimension of proprietary interests is directly portrayed by the second approach. It is only in this relative sense that questions of quasi-property can be answered.

- In post-employment cases trade connections do not become proprietary just because they can be regarded as connections of the employer. They are still free game for third parties. However, courts regard them as belonging to the employer as a proprietary interest where the employee stands in a certain relationship to such customers.
- Any undermining of the value of a trade secret is not protectable. Trade secrets may only be protected in so far as knowledge of them may be exploited. Again, it is the particular relationship between the parties that establishes the proprietary nature of the interest.
- Goodwill is not property in that it may be devalued by competition of third parties. However, a particular relationship between the parties, namely that of buyer and seller, may transform it into an interest that the court will regard as proprietary because of the sale.

16.2. Proprietary interests and the unprotectability of certain interests

Freedom from possible future competition has not been regarded as a proprietary interest. This principle has often been jumped upon by advocates of the notion that the main purpose of the restraint of trade doctrine is to promote competition or trade in general [325]. But much more fundamental principles underlie this tenet. Cheshire Fifoot and Furmston [326] put it thus:

> "The possibility that the servant may be a competitor in the future is not a danger against which the master is entitled to safeguard himself. On the contrary, it

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[324]. See also supra 4.4 and 5.1.

[325]. E.g. Petrofina (Great Britain) Ltd v Martin [1966] 1 All ER 126 at 139; See supra Ch 3.5; Cf the economic analysis of this principle Trebilcock 133-139 and the very critical approach 146-148.

[326]. Cheshire Fifoot and Furmston 401 and the reference to Leather Cloth Co v Lorsont (1869) LR 9 Eq 345 at 354; See also Ch 3.6; Cf McBryde 595.

> accords with public policy that a servant shall not be at liberty to deprive himself or the state of his labour, skill or talent".

Freedom from competition cannot be said to be an *asset* that *belongs* to the covenantee in a free market society. The principle that free competition is economically preferable impacts upon the tenet that freedom of competition is not a proprietary interest. But freedom of competition does not appear to be the underlying principle.

The proprietary interests concept most conspicuously culminates in the principle that freedom from interference by use of personal skill and knowledge of the covenantor is not a protectable interest. The other side of the proprietary interest coin is that covenantors also have skills and knowledge that are outside the realm of the covenantee. It is through the notion that personal skill and knowledge are unprotectable that courts bolster the principle of freedom of work by narrowing interest down to only those that can be said to *belong* to the covenantee. This is necessary if courts are to take the protection of freedom of work seriously. It is however sometimes difficult to determine what is the property of the covenantee and what personal skill and knowledge of the covenantor.

Heydon [327] contended that personal skill should not be the sole object of restriction because it will promote a free labour market and it "enables a man's general skill to be available to all would-be employers". This is correct but too narrow. It allows for the proper protection of the ability of the covenantor to work and keeps it intact. A restraint will not be allowed if it merely attempts to benefit the covenantee by diminishing the ability of the covenantor to work [328]. The covenantee will have to show another clear economic proprietary interest that may be balanced against the interference with freedom of work.

It is even trite that the covenantee cannot restrict mere personal skill where it has been acquired in the service of the employer or as a consequence of training of the covenantor. But it is more difficult to justify the unprotectability of such interests. Here some contribution has been made by the employer for the improvement of the employee, and it has often been argued that one of the most important reasons why some post-employment restriction should be valid is because it will promote training and betterment of employees [329]. Nevertheless, the proprietary interest concept has still prevailed. The courts have accepted that much of what an employee learns during his

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[327]. Heydon 104-105.

[328]. Mason 740-741; Herbert Morris 714; SW Strange Ltd v Mann [1965] 1 WLR 629 at 638 discussed this issue in the context of property although it probably went too far here; See also Corbin 1394 in Heydon 105-106; Christie 444; See supra Ch 3.8.

[329]. Supra 16.1; Trebilcock 129-132.

employment becomes part of him, and this has remained an important aspect of the doctrine. The protection of freedom of work will be rather empty if it does not also bolster the use of acquired skills and knowledge. Hence, Schoombee calls the protection of investment in employees in *Magna Alloys* [330] "pernicious and feudalistic" [331].

The notion that these interests cannot be protected because they are not proprietary is not an absolute. It is merely a result of a policy position based on a certain perception of public interest and policy. It would be possible to allow the protection of these interests. However, it would make severe inroads into the freedom of work. It would mean that the freedom of work is subservient to almost any interest of the covenantee.

There are cases where protection should be allowed though one of these interests lies at the basis of the restraint [332]. But it is probably still in accordance with modern mores that these interests should not be regarded as protectable per se.

17. Are there any legitimate interests beside the traditional ones?

It is difficult to discern from the authorities whether only the hitherto recognised interests will be protectable in the classic restraint of trade cases. Most of the cases are inconclusive. On this point, the courts merely stress the trite interests, and the question whether others may be protected has not been given any real attention.

Some authorities accepting that there is no closed category of interests are unhelpful, because such statements are made without paying proper attention to the special problems of classic restraints [333]. The restraints in classic cases do not apply during work relationships, and such restraints can create severe inroads upon the ability to work, as no concomitant and contemporaneous work benefit will arise. [334]. In *Eastham* Wilberforce J was prepared to protect interests beyond the traditional, and he then took a wider view in the particular case [335]. But he was at pains to limit the import of his decision to the special sports body case before him.

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330. Magna Alloys 904-905. See supra 8.3.
331. Schoombee 142; Cf also Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 200.
332. See infra Ch 9.12.
333. Guest 8; Heydon 259ff; Kerr 509; Cf the somewhat more careful view Chitty 1198 but see the criticism infra Ch 9.12; Guest 8 although the view of the author that these wider interests are protectable because of modern mores cannot be accepted.
334. See Anson 323; Supra 6.1.
335. Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413 at 432, Sales 610-611; See also Greig v Insole [1978] 3 All ER 449 at 496-497 Slade J casuistically applied the Eastham case as this case also concerned a sports controlling body; Treitel 405 did not properly consider the qualification in Eastham; Walker 188 with reference to

A conservative stance was taken in some South African cases. Franklin AJ in *Tension Envelope* [336] correctly accepted that the extension of protectable interests in *Eastham* was based on the particular facts of the case. He then stated:

> "I have not been referred to any decided case of a master and servant relationship in industry in which a proprietary interest deserving of protection has been held to extend to something other than the two categories ... ".

This narrow approach was again followed in the more recent South African case of *Sibex* [337].

These decisions must be balanced against the contrary opinion of Eksteen JA in *Basson* [338] in an even more recent Appeal Court case, but this case is open to criticism.

- The court seems to have suggested that it would not even always be necessary to rely on proprietary interests or even interests.
- It stated that a more dynamic view had to be taken because public policy is itself dynamic; but the court over-estimated the changeability of public policy.
- The judge did not even mention the *Sibex* case and that case was, accordingly, not expressly rejected.

Moreover, Nienaber JA in *Basson* [339] returned to the more careful but flexible approach that preceded *Sibex*. He merely assumed that wider interests could be protected in the particular case.

There is no settled authority on whether other interests are protectable, and the question accordingly will have to be approached from a theoretical perspective. Interests can, theoretically, be extended. Courts normally do not look beyond the protection of standard protectable interests. But the delineation of these interests represents a relatively recent episode in the development of the restraint of trade doctrine [340]. The courts have often stated that there is a wider principle underlying the recognised interests; other interests should accordingly be protectable as long as they are in accordance with these principles.

The narrower view taken by the court in *Sibex* [341] is probably a consequence of the onus issue in South Africa. There the onus is on the person who attempts to prove unreasonableness [342]. A

Eastham argued that other interests will probably be protectable in post-employment cases but the case must be approached with care.

336. Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348-349.

337. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 505-506, See also 502.

338. Basson v Chilwan 1993 (3) SA 742 (A) 762.

339. Basson v Chilwan 1993 (3) SA 742 (A) 770 although some of the cases mentioned are not authority for this point, Rautenbach & Reinecke 555.

340. Supra 2.

341. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 505 see supra.

negative aspect has to be proved. He will be in a difficult position if he has to prove that interests do not exist although he does not even know what those interests should be. It will simplify his position if he just has to prove that a numerus clausus of interests does not exist. The wider approach suggested here should be applied in South Africa with one qualification. There should at least be a duty on the covenantee to adduce evidence that will again disturb the balance of probabilities if it is proved that the covenantee does not have sufficient trade secrets or customer connections to support a particular restraint .

The more complex question, however, is: to what extent should further interests be recognised? Or, to put it in the current context, to what extent is the proprietary interest principle cast in stone? The notion of proprietary interests is not a necessary basis for determining interests that can be protected. It is the result of judicial policy. It depends on the priority that the court gives to the principle of freedom of work. Freedom of work will be seriously undermined if courts extend interests beyond those that are proprietary.

Some relaxation of the rigid application is necessary. But it would be best, under current conditions, to extend protection through a different channel. Non-proprietary protectable interests should not be created, but interests that are not proprietary should be protected on the specific facts of the case after investigation of wider reasonableness aspects [343]. Such an approach is more subtle and gives room for the fine balancing act that has to take place in cases that concern non-proprietary interests. Schoombee [344] is correct in submitting that the proprietary interests principle is too narrow, but simplistic extension by merely creating wider protectable interests will not be satisfactory. All attempts to extend protection beyond proprietary interests have thus far failed.

The same approach would probably still be maintained in South Africa. In *Magna Alloys* the court was prepared to allow protection of investment in human capital, but this departure from traditional principles was not properly justified in the case [345]. Schoombee [346] has argued that certain wider interests such as social utility, when it advances stability or rational control, may in future be protectable in terms of the *Magna Alloys* approach, but the proprietary interests requirement has now been confirmed for the purpose of South African law in *Basson* [347], by Nienaber JA, who took the most acceptable view on the law [348].

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342. Infra Ch 11.
343. See infra Ch 9.12.
344. Schoombee 140.
345. Supra 8.3 and 16.2.
346. Schoombee 142 although he also strongly argues that this should not go too far.
347. Basson v Chilwan 1993 (3) SA 742 (A) 771.
348. See infra Ch 7.2.3.

Hence, the most important constraint on the recognition of new interests in the traditional cases will be that only proprietary interests will be recognised. Although no further proprietary interests have been admitted in the courts, it is still possible that other proprietary interests may exist in the infinite number of factual permutations that come before the courts.

- A patent may probably be protected by restraint [349].
- In *Hepworth* [350] a film actor was restricted by the producer for whom he worked. The producer argued that a restraint should be allowed as it protected the value of existing films. The covenantor would not be able to work in films of low quality that would devalue the existing films of the producer. The court decided that the restraint here was too wide for the protection of such an interest [351], and held that the interest would not be undermined on the facts [352]; but it never denied that such an interest could be protected in certain circumstances by a properly phrased restriction.
- An admittedly tenuous interest may exist in post-employment restraints where protection is sought against poaching of employee contacts [353]. A poaching restraint of this nature exists where (A) concludes a restraint with (B) according to which (B) is restricted from poaching employees of (A) for a certain time after leaving the service of (A). It may be said that the ties with employees in such cases are proprietary and that they are protectable in so far as the covenantor may interfere with them because of influence that he has gained as an ex-employee of the covenantee [354]. Sales [355] stated that these interests will not be proprietary. According to him, personal skill and ability of employees can never constitute a proprietary interest. However, he did not properly realise that the protected employees are third parties for the purpose of the restraints. The problem of the freedom of work of these third parties will still have to be dealt with [356]. But the employee connection is proprietary between covenantor and covenantee, and for the purpose of the reasonableness inter partes requirement.
- Courts may in future allow the protection of trade secrets and confidential information of customers that become known to the employer's business in the exercise of their normal activities. These are not truly proprietary trade secrets of the employer, but it is essential to

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[349]. See Electric Transmission Ltd v Dannenberg (1949) 66 RPC 183 at 192 where the restraint was too wide for this purpose.
[350]. Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1.
[351]. Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 15, 25, 31.
[352]. Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 15, 25.
[353]. For clauses where the contract contained such a clause but where its reasonableness was not in issue: Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 (1) SA 807 (W), Basson v Chilwan 1993 (3) SA 742 (A) 758.
[354]. Cf Sales 614-615.
[355]. Sales 611.
[356]. See infra Ch 10.5.2.

> the exercise of the business that such information should be protectable. It still constitutes a type of proprietary interest that the employer necessarily requires for conducting its business. But the issue has not been properly analysed by the courts [357].

The judicial methodology in delineating legitimate interests and the development of these interests should be analogous to the judicial approach and development of categories of contracts that fall within the restraint of trade doctrine. Courts should recognise that certain interests are protectable while others are not. They should also admit that the hitherto accepted interests do not form a numerus clausus, and they ought to acknowledge that new proprietary interests might be admitted in terms of general principles.

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[357]. Systems Reliability Holdings plc v Smith [1990] 377 at 385 allowed the protection of such information by restraint; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) 528 where such information was defined as a type of trade secrets although it was accepted that it could not happily be so called and where implied protection was granted.

Chapter 7

The delineation of sale of business and employment restraints and the position of post-partnership restrictions

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1. The line between sale of goodwill and employment restrictions

There are many similarities between the rules and principles applying to sale of business restraints and those that govern post-employment restraints. However, there are also clear grounds for separation. Some distinction was already drawn in pre-*Mason* law [1]. Yet the most fundamental difference became established in the post-*Mason* era [2].

Some courts have related the distinction to the different interests that can be protected in sale of business and post-employment cases [3], and this distinction can be easily justified in terms of the scheme as it has been thus far developed. The protection of interests depends on the relationship between the parties in a particular case. A sale of goodwill contract, of its nature, throws up different interests from a post-employment contract. The interests that can be regarded as proprietary between purchaser and seller are different from those that will fall in this class in post-employment cases [4].

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[1]. See counsel in Proctor v Sargent (1840) 2 Man & G 20 at 25 and Dendy v Henderson (1855) 11 Exch 194; Some rudimentary distinction was drawn in: Mallan v May (1843) 11 M & W 653 at 666, Leather Cloth Co v Lorsont (1869) 9 LR Eq 345 at 354 and Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453, But see the criticism Gooderson 413; Nordenfelt 543-544, Cf also 541, See Empire Meat Co Ltd v Patrick [1939] 2 All ER 85 at 92, Durban Rickshas Ltd v Ball 1933 NPD 479 at 492, 494, Cf Mouchel v William Cubitt & Co (1907) 24 RPC 194 at 199-200 accepted the argument but still followed earlier authorities; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 305 and 310; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 especially 773, See Attwood 586; Christie *Jur Rev* 302; See on the history: Attwood v Lamont [1920] 3 KB 571 at 582ff, Cheshire Fifoot and Furmston 400, Heydon 78, Blake see the conclusion 637.

[2]. See except for the authorities mentioned below: Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 806 where this issue was not really taken further, Connors Bros Ltd v Connors [1940] 4 All ER 179 at 190, Farwell 71, McBryde 594, Christie *Encyclopaedia* 590, Halliwell v Laverack 1929 WLD 175 at 180, Durban Rickshas Ltd v Ball 1933 NPD 479 at 482, Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W) 364; Blake 646, 639, 646; See however Williston Contracts (Rev ed) para 1643 was very critical of this distinction.

[3]. Herbert Morris 701, 708-709, 713-714; Eastes v Russ [1914] 1 Ch 468 at 490; Attwood v Lamont [1920] 3 KB 571 at 589-591; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 575; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 23; Empire Meat Co Ltd v Patrick [1939] All ER 85 at 92; Jenkins v Reid [1948] 1 All ER 471 at 478ff, 480; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 238-239; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1372; George Silverman Ltd v Silverman (1969) 113 Sol Jo 563; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1228-1229; Bridge v Deacons [1984] 1 AC 705 at 713-714; Anson 322, 328; Davies 491; Scottish Farmer's Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 150; Kennedy v Clark (1917) 33 ShCt Rep 136 at 139; Christie *Encyclopaedia* 591; Gloag 570; Gordon v Van Blerk 1927 TPD 770 at 773-774; Estate Matthews v Redelinghuys 1927 WLD 307 at 311-312; Durban Rickshas Ltd v Ball 1933 NPD 479 at 482; Holmes v Goodall and Williams Ltd 1936 CPD 35 at 41; Aling and Streak v Olivier 1949 (1) SA 215 (T) 220; Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198.

[4]. Herbert Morris 701, 708-709, 713-714; Attwood v Lamont [1920] 3 KB 571 at 589ff; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 23; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 575; Durban Rickshas Ltd v Ball 1933 NPD 479 at 492; Jenkins v Reid [1948] 1 All ER 471 at 477ff; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 270 but see the discussion supra; George Silverman Ltd v Silverman (1969) 113 Sol Jo 563; Bridge v Deacons [1984] 1 AC 705 at 713-714; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 382; McBryde 600-601; Christie *Encyclopaedia* 592; Winfield (1946) 320; Gordon v

Nevertheless, a second ground for distinguishing the different types of restrictions has also emerged. In many cases the courts have also mentioned that bargaining power lies at the basis of the distinction. It has been emphasised that parties to a post-employment restraint will often be in a position of unequal bargaining power while they will bargain equally in sale of business cases. However, bargaining power will not be consistently equal or unequal in the different types of cases [5]. Hence, bargaining power cannot be utilised today in distinguishing the different types of contracts. It will be necessary to investigate the extent to which bargaining power has infused the substantive distinction between sale of goodwill and post-employment restraints.

Admittedly, some courts have emphasised equality of bargaining power in an attempt to explain why different interests are protectable in post-employment and sale of goodwill cases. The obfuscation in South Africa became so complete that judges simply equated the distinction between different contracts with a difference in equality of bargaining power, and this in turn was regarded as the basis for the protection of different interests [6].

However, this line of authority is unacceptable. There is no direct logical and conceptual connection between the protection of certain interests and bargaining power. The distinction between the interests protectable in sale of business and post-employment contracts can be exclusively justified on the basis of general principles underlying the protection of interests.

In most of the cases that stress bargaining power, the court was not specifically and exclusively dealing with the distinction of protectable interests [7]. Bargaining power, if it has played any role

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Van Blerk 1927 TPD 770 at 773-774; Estate Matthews v Redelinghuys 1927 WLD 307 at 311-312; Holmes v Goodall and Williams Ltd 1936 CPD 35 at 41; See the cases discussed chapter 6 and infra.

[5]. Infra Ch 9.2.

[6]. Malan v Van Jaarsveld 1972 (2) SA 243 (C) 245-247 although it was accepted that it was too mechanical; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 612; Filmer v Van Straaten 1965 (2) SA 575 (W) 578-578 with reference to Hepworth Ltd v Snelling 1962 (2) PH A.48, See Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W) 309, Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348; Kerr 507-508 but see the more acceptable approach 510-511.

[7]. The early cases must be approached with caution as the legitimate interests test had not yet been refined: Nordenfelt 566, Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453, E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 310; Cf the distinction between post-employment restraints and cartels North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 471 although it is not clear; Mason 738 with reference to Nordenfelt; Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 84-85 although the court here took it quite far; Attwood v Lamont [1920] 3 KB 571 at 586 compared with, 590-591; Routh v Jones [1947] 1 All ER 179 at 183-184; Whitehill v Bradford [1952] 1 Ch 236 at 246; M & S Drapers v Reynolds [1956] 3 All ER 814 at 820-821 although the court accepted that bargaining power also be different within a particular type of contract; Although mentioned in a different context see T Lucas & Co Ltd v Mitchell [1974] 1 Ch 129 at 136; Atiyah 340; Cheshire Fifoot and Furmston 400; Chitty 1212 (See also 1199 where the author stressed that the different contracts serve different purposes although it was not properly related to interests); Heydon 81ff with reference to Blake 646-648;

here, has merely been a secondary ground for protecting different interests in the two types of cases.

But it is possible to go even further. Sale of business and post-employment restrictions have been distinguished on different levels. Not only will divergent interests be protectable in the different cases, but courts will also be more strict when determining reasonableness in post-employment cases. Bargaining power, if relevant at all [8], should apply on the second level. The case of *Brenda Hairstylers* [9] can be mentioned as an example. Both counsel stressed bargaining power. The court acknowledged that bargaining power would play a central role, but stressed the more fundamental distinction between the different types of contracts in determining in what category a restraint fell and in laying down what interests were protectable [10].

The distinction between the different types of contracts is left unscathed by the rejection of bargaining power as a basis for distinction in *Roffey* [11]. In casu Didcott J only rejected the notion that post-employment restraints should be "approached more critically and condemned more readily", and this should be narrowly interpreted. Cases that tried to read more into this statement [12] must be rejected. The broader notion that the courts will be more benevolent in sale of business cases certainly played some role in establishing the distinction on the level of protectable interests. But it has not been indispensable to this fundamental distinction.

Attempts by Eksteen JA in a recent Appeal Court case in South Africa to revive the bargaining power basis for the distinction must be rejected out of hand [13]. The judge qualified his view in

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Treitel 404; Walker 187; Scott-Robinson 158; Dempsey v Shambo 1936 EDL 330 at 334, 339; Lewin v Sanders 1937 SR 147 at 149; Schwartz v Subel 1948 (2) SA 983 (T) 987-988; Cowan v Pomeroy 1952 (3) SA 645 (C) 649-650; Wohlman v Buron 1970 (2) SA 760 (C) 762; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 235-236.

8. Infra 9.2.

9. Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280.

10. English Hop Growers Ltd v Dering [1928] 2 KB 174 at 181, Quoted with approval in New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 83; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; Cf Comments (1951) 19 *University of Chicago Law Review* 97 especially from 101 where it was mentioned that American Courts sometimes recognise differences based on bargaining power but that they still "overlook the fundamental differences" that exist between the different types of contracts. See the discussion of these issues 101ff.

11. Roffey v Catterall Edwards and Goudre 1977 (4) SA 494 (N) 499, Cf the comments Nathan 38; Similarly the criticism Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 72-73; Christie 440, 447; Schoombee 132, 142; Nathan 37; Lubbe and Murray 257; See also Turpin *Annual Survey* (1958) 55 quoted by the court in Malan v Van Jaarsveld 1972 (2) SA 243 (C) 247.

12. Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198 and the criticism of Roffey; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 257-258; Van der Merwe 158 on this issue is too simplistic.

13. Basson v Chilwan 1993 (3) SA 742 (A) 763, See Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 442.

some respects. He accepted that not all post-employment contracts will necessarily be concluded unequally. But his thesis remains unacceptable.

1.1. Distinguishing the different types of restraints

In determining into which of the two classes a particular contract falls, the courts will, in each case, have to determine what the wider objective of a contract is [14]. If the main aim of the relationship is the sale of a business, then it should be so classed. If the contract is aimed at organising a work relationship between the covenantee and covenantor, then a restriction that applies after termination of the relationship should be treated as a post-employment restraint.

But it will sometimes be difficult to determine whether a restriction is of the post-employment or sale of goodwill variety [15]. Harman J in *Systems Reliability* [16] stated that:

> "The courts have always to try and apply the test of reasonableness to the circumstances and facts of the particular case before them, and classifying them as master and servant cases or vendor and purchaser cases is convenient - and no doubt provides the academics with a lot of writing to do in learned articles - but is not a useful thing for the court which has got to sit down and say: 'What is reasonable in this particular deal?'"

There are deeper underlying principles that manifest themselves in the distinction drawn between sale of goodwill and post-employment restrictions. Theoretically speaking, it could be abandoned and each case could be treated in terms of broad principles. There is no use in trying to develop an entire jurisprudence on the distinction between the two types of restraints. However, it continues to be a very useful distinction and still facilitates the application of principles and rules to the facts of a specific case. It does not escape the eye that the judge later on made substantial use of the distinction between the different types of contracts.

The distinction will create special problems in cases where the two types of contracts are combined. In sale of goodwill transactions the seller is often offered employment with the buyer. In most cases this will not influence the essential nature of the restraint; it will generally still be regarded as a sale of business [17]. However, there will be exceptions. In *Bishop* [18] the consideration

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[14]. Supra Ch 6 especially 16; Heydon 201 argued that restraints on retirement have sometimes been treated like sales of goodwill but he did not give any authority. It is unacceptable; The question left open Alliance Paper Group v Prestwich 1996 IRLR 25.

[15]. Office Overload Ltd v Gunn [1977] FSR 39 at 41, 43; Davies 492; Heydon 202.

[16]. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 383.

[17]. For cases of this nature: Marshalls Ltd v Leek (1900) 17 TLR 26; Welstead v Hadley (1904) 21 TLR 165, Cavendish v Tarry (1908) 52 Sol Jo 726 where this question was not yet in issue; D Bates & Co v Dale [1937] 3 All

for a transfer of goodwill was an employment contract and an annuity (although it appears that the annuity was actually consideration for the premises). Scant evidence is available from the report and the issue was not really addressed by the court, but this contract looks more like one where an employee was brought into employment with the customers that he had beforehand [19]. The court must look at the substance and purpose of each transaction [20].

1.2. Restraint of trade and sales of shares or goodwill by companies

Restraints are often attached to sales of shares or sales of assets of a company [21], and it may be difficult to determine the class of contracts into which they should fall [22]. The most important principle is that courts must look at the substance of the contractual relationship and not at the form [23]. It has not yet been so discussed, but it would perhaps be most acceptable to deal with the whole issue as an area where the corporate veil can in some cases be lifted. The veil should be lifted, and the court should treat restrictions of such persons as sellers of a business, if the corporate entity is a vehicle used in the effecting of a sale of business between covenantor and covenantee. However, the court should deal with the company as a separate entity for the purpose of the doctrine where the company itself plays a fundamentally important role as either buyer, seller or object of the sale, or where the buying and selling of shares constitute an aim in their own right.

The corporate veil should be lifted where one of the important participants in a company sells his shares in it or where a substantial shareholder or group of shareholders sell their shares and it is manifest that it is done with the aim of transferring the business carried on by that company. The

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ER 650; Heydon 201-202; Dumbarton Steamboat Co Ltd v MacFarlane (1899) 1 F 993; Donald Storrie Estate Agency Ltd v Adams 1989 SLT 305, Sterling Financial Services Ltd v Johnston 1990 SLT 111 where the question whether the employment contract was an integral part of the sale was important for other reasons; Stirling Park Co v Miller (unrep).

18. Bishop v Kitchin (1866) 38 LJQB 20.

19. See supra Ch 6.4.1.

20. Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; See infra 1.2 the cases where a company also enters the scene; Treitel 406; Chitty 1212; Cf Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 233 and see infra.

21. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 382; Gooderson 421 in 1963 stated that there were no cases on restraints in sale of shares but it has now changed; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 233 cannot be accepted.

22. Nordenfelt 540-541, 551, 555, 560 is very specific to the facts of the case; Cowan v Pomeroy 1952 (3) SA 645 (C) 650 the court did not justify its conclusion; See also Gooderson 419-421.

23. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 382 where this has been clearly expressed. But see the criticism infra the principles were not correctly applied here.

seller should be treated like a seller of goodwill even if he is thereafter employed by the company [24], and even though he still holds some shares in the company.

- Control should be pivotal [25]. In *Systems Reliability* the court observed that "the courts would be stultifying themselves to hold that only what were called controlling shareholders or persons having major investment can be bound" [26] . However, this seems unrealistic. How can the covenantor be restricted from interfering with the whole of the goodwill if he only has a small proprietary interest in it? The court mentioned that it would be particularly important not to refuse such protection in a world where workers are now encouraged to acquire shares in the companies for which they work. But, it seems, the opposite is true. Should all workers who have some shareholding now be restricted as proprietors? On the view taken by the judge, the whole of the goodwill would have been protectable although the covenantor had a 1.6% share in the business. The later analogy which the court drew with partnerships appears to be more convincing but, it is submitted, the court also erred in its application of such principles [27].
- Whether the covenantor is a director will be relevant in answering this question, but *Connors* goes too far in suggesting that a managing director holding shares will be treated in the same manner [28]. Mere employment or even directorship does not give the necessary proprietary connection to goodwill which makes it protectable against the covenantor.
- The buyer must be buying the shares to get at the business. *Commercial and Industrial Holdings* [29] stressed that a person who buys shares on the basis of profitability may protect the business against competition by the seller. The terminology used can be faulted but the ideas behind it cannot.

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[24]. Connors Brother Ltd v Connors [1941] 4 All ER 179 at 190-191, 193 but see the criticism infra; Spink (Bournemouth) Ltd v Spink [1936] Ch 544 was too cautious; George Silverman Ltd v Silverman (1969) 113 Sol Jo 563; Kirby v Thorn EMI plc [1988] 1 WLR 445 could probably have been decided on this basis if the restraint of trade had been in issue; Heydon 201-202; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 103 and 109 for a wider argument; Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 281; See Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 233 placed too much emphasis on the specific contract that actually contained the restraint, Cf Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W) 363 where a better view was taken on this point, Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 404-405 the criticism of Chubb is unacceptable.

[25]. Treitel 403; Cf David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 435, See however the criticism infra 2.3. See *Annual Survey* (1984) 130.

[26]. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 383, 383, 384.

[27]. See Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 383 and the discussion in the next section infra 2.3.

[28]. Connors Brother Ltd v Connors [1941] 4 All ER 179 at 190-191, 193 although the court expressly declined from laying down general principles; Heydon 191-192; Cf Nordenfelt supra did not look at shareholding but there were other important elements beyond the fact that the covenantor was a managing director.

[29]. Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 233.

The buyer should be able to defy the corporate veil and bind the real sellers where a company controlled by a certain person or persons sells the business out of the company [30]. The arguments mentioned in *Nordenfelt* [31] will in similar circumstances play an important role in showing that a shareholder could be described as a seller of goodwill. This might, however, create some problems where the business is sold into a new company in which the seller still has an important stake [32].

It will accordingly often be important to show that the veil should be lifted but it should not be conclusive for the purpose of protection. There will be cases where protection can be based on other grounds:

- Where a company is sold by shareholders, there might also be goodwill in the hands of the shareholder, and this goodwill may also, on the right facts, be independently protectable [33].
- There may also be cases where the shares themselves may be protectable [34]. Nevertheless, this will probably seldom be the case. It will be difficult to show that a restraint will be necessary to protect such shares qua shares. The courts have been strict in recognising the link that has to exist between the proprietary interest and the damage that can be caused if not for the restraint [35].

1.3. The need to still draw parallels between post-employment and sale of goodwill restraints

Some authorities have doubted whether it is at all necessary to relate sale of business and post-employment restraints to one another [36]. It is important for courts and practitioners to be cautious when citing precedents that fall into one category in cases where restraints of trade actually fall into the other [37]. However, the link between the different types of contracts must not be ignored. There are still many theoretical similarities, and each still has much to contribute to the development of the other and to the common development of classical restraints. Both contain

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30. See Blake v Blake (1967) 111 Sol Jo 715; See the facts of Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 would today fall in this class, See Heydon 192; See Treitel 403 it might be difficult to frame a suitable covenant that will give protection against competition by associate companies; See Forman v Barnett 1941 WLD 54 at 60 where principles were not investigated.
31. Nordenfelt supra.
32. Infra 2.3 especially the Biografic case.
33. Kirby v Thorn EMI plc [1988] 1 WLR 445 at 453-454.
34. George Silverman Ltd v Silverman (1969) 113 Sol Jo 563; Although it is not clear it seems that vaguely similar ideas also played some role in Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 233.
35. See supra Ch 6.16.
36. Blake 646.
37. Chitty 1200.

restraints that start to bite when there is no ongoing working relationship between the parties. The emphasis in both cases will be on proprietary interests [38].

1.4. The borders of classic restraints

It will sometimes be very difficult to determine whether a restraint falls in one of the two traditional categories, or whether it should fall in a class where different principles apply [39].

1.4.1. Actor cases

In the actor cases such as *Tivoli Manchester* [40], an entertainer is restricted, either before or after the performance for the covenantee, from performing for certain competitors. Heydon [41] explains these cases on the grounds that the covenantee has customers that he can protect. But people attending a particular musical event on a one-off basis cannot be described as customers in the sense described in this work. One of the ways in which these restraints can be explained is by acknowledging the differences between these and the classical type of post-employment restraint. Hence the court in *D'Oliviera* [42] decided that the services of a band of musicians were hired out to the theatre company and that it was not a post-employment case.

1.4.2. Restraints during and after termination of employment

In some cases the restraint will operate both while a work relationship is in operation and after it has ceased [43]. The two aspects of the restraint will have to be distinguished in determining reasonableness. This was not always done in the past [44], but it is fundamental [45].

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38. Blake 646 therefore puts it too strongly.
39. See partnership restraints infra 2.
40. Tivoli Manchester Ltd v Colley (1904) 20 TLR 437, Empire Theatres Co Ltd v Lamor 1910 WLD 289 although the cases were not decided in these terms because they were pre-Mason; See also the discussion of the cases supra Ch 6.1 and infra Ch 9.12; Cf African Theatres Ltd v Jewell (1918) 39 NLR 1 where interdict was stressed. The court merely stated that the restraint was not per se illegal.
41. Heydon 118.
42. African Theatres Ltd v D'Oliviera 1927 WLD 122 at 129.
43. Mumford v Gething (1859) 7 CBNS 305 at 322, 323-324, 327; Marshalls v Leek (1900) 17 TLR 26; Eastes v Russ [1914] 1 Ch 468 at 474, 479, 489, Heydon 131.
44. For cases where the two aspects existed but where the distinction was not really in issue: Although it is not clear George Hill and Co Ltd v Hill (1886) 3 TLR 144, Nicholls v Stretton (1843) 7 Beav 42, Palmer v Mallet (1887) 26 Ch 411, Dubowski & Sons v Goldstein [1896] 1 QB 478, Haynes v Doman [1899] 1 Ch 13, Townsend v Jarman [1900] 2 Ch 608 for a similar partnership restraint, Berlitz School of Languages Ltd v Duchene 1903 6F 181 although it was regarded for the purpose of the assignability issue see infra, Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564, Kemp Sacs & Nell Real Estates v Soll 1986 (1) SA 673 (E).
45. See Sainter v Ferguson (1849) 7 CB 716 at 728-729, 730; William Robinson & Co v Heuer [1898] 2 Ch 451; McBryde 594.

In *George Michael* a recording artist was restricted in his activities while the contract was in operation, and was also restrained from making re-recordings after termination of the relationship. The court made short shrift of this distinction [46]. But the broad reasonableness approach followed is too broad. The interests of the covenantee and the extent of the restraint should have been more closely investigated, and that could only have been properly done if the distinction was recognised.

In *Basson* [47] Nienaber JA accepted that wider protection would be allowed for restraints that operate during employment relationships. The clear distinctions which he drew have a wider significance, and the judge seems to have been conscious of this:

- The covenantor will still receive his rewards for the duration of the contract. He will receive his dues while under restraint.
- The employee will not be unproductive if the restraint operates during employment, which is conceivably not so where the restraint operates after termination.
- The restraint would only come into effect on narrower grounds if it applied during employment [48]. It could only restrict the covenantor without the concomitant advantages of the employment contract where the employee leaves his employment and it would not operate if the relationship is terminated for any other reason. The restraint may jeopardise freedom of work on much wider grounds if it applies after employment [49].

The distinction was criticised by Van Heerden JA, but his criticisms do not hold water:

- He argued that payment will not be very important because the employer will not be forced to pay the employee if he does not perform his services [50], but this is not a very damning criticism. The employer will still be unable to enforce the restraint if he is not prepared to pay for it.
- He mentioned that the employee will still be unproductive when the restraint only operates during the employment relationship if the employee refuses to work for the employer [51]. But the point remains that the restraint will at least be tied to a work relationship and the employee cannot be restricted unless he is given the *opportunity* to work. The possibility of unproductivity will be reduced.

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46. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 378.
47. Basson v Chilwan 1993 (3) SA 742 (A) 771-772.
48. Basson v Chilwan 1993 (3) SA 742 (A) 776.
49. See infra 9.11.
50. Basson v Chilwan 1993 (3) SA 742 (A) 776.
51. Ibid.

- He submitted that Nienaber JA's distinction is too rigid [52]. He stated that parties may decide against it on the basis that they may conceive that one or more of them may want to leave the relationship. But this is no reason for not accepting the solution proposed by Nienaber JA. The latter suggested that restraints should rather be concluded to operate during relationships of work *if the aim is to tie in the skills of a party or parties for a particular time*.

Moreover, the most important ground for the distinction was not even mentioned by the judge. Wider protection should not only be granted because the interests of the community and the covenantor will be interfered with to a lesser extent. It is inherent in the nature of such restraints that they will justify wider protection for the covenantee. Work skills can, mostly, only be properly harnessed if exercised within a regulated relationship. The proper organisation of the relationship becomes an important protectable interest here.

1.4.3. When will the work relationship be terminated?

Substantive and jurisdictional questions will depend on whether the work relationship is contemporaneous with the restraint. However, restraints aimed at applying during work relationships normally run contemporaneously with the contract as a whole, and there may be a difference between this contract and the relationship of work [53]:

- The employee can repudiate the contract by leaving the service of the employer for good, and the employer can refuse to accept the repudiation [54]. The contract will run for the period of notice although no work relationship will exist between the parties.
- Where notice is given the work relationship will often terminate before it has run out (so-called garden leave). In such cases the contract of employment will still exist but there will be no further relationship of employment [55].

There will probably be no need to consider a discrepancy between the duration of the employment relationship and the contract if the contract provides for a short notice period. But it will be difficult to ignore such differences in cases where there may be a big discrepancy [56]. The employer cannot in these circumstances rely on the need for facilitating the proper exploitation of the work

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52. Basson v Chilwan 1993 (3) SA 742 (A) 776.
53. Cf Kimberley v Jennings (1836) 6 Sim 346 at 349-350 although remarks were not made with reference to issues under discussion here; Cf Ehrman v Bartholomew [1898] 1 Ch 671 at 673.
54. Evening Standard Co Ltd v Henderson [1987] ICR 589; Cf the facts of Super Safes (Pty) Ltd v Voulgaridis 1975 (2) SA 783 (W).
55. Provident Financial Group plc v Hayward [1989] ICR 160.
56. See Provident Financial Group plc v Hayward [1989] ICR 165, 167; Cf Ehrman v Bartholomew [1898] 1 Ch 671 at 674.

of the employee; during this last mentioned period the restraint will be akin to a post-employment restraint. It is tempting to argue that such circumstances will have to be considered in determining the reasonableness of the restraint as a whole.

In South Africa reasonableness will be determined from the moment when the court is asked to enforce it. At this moment it will frequently be possible to see whether the restraint will be enforced during a working relationship. Post-employment principles should be applied if the restraint will have to run while the parties are not in a work relationship any more. If the restraint will operate during both the employment relationship and thereafter, then the flexible approach which South African courts follow towards severability [57] can be used to deal with the situation.

However, these issues will be problematic in English and Scots law. In these legal systems two issues will stand in the way of discounting the discrepancy:

- Reasonableness must be determined from the moment of conclusion of the contract. From this point it will be difficult to determine what the duration of the working relationship as opposed to the duration of the contract will be.
- The courts will be stricter with regard to severability. The courts will therefore be more cautious in allowing a restraint to be reshaped once it is regarded as illegal [58].

The court will probably only consider the distinction between the contract and the relationship of work in English and Scots law if it was foreseeable at conclusion that the two may differ. A restraint will be classified as post-employment where the contract has a long period of notice and where it was probable that the work relationship would be terminated during this period, or where the contract provides for garden leave. But few cases will contain such clear facts. Accordingly, a discrepancy between the work relationship and the contract will seldom influence the reasonableness question. If a restraint will be reasonable during employment, and if it will probably normally apply during a true work relationship, then it will generally be reasonable even if it turns out, in the end, that there is a discrepancy between the employment contract and the work relationship.

It is difficult to discern any principles from the cases, as they mostly concern interim relief. It is often difficult to distinguish the question whether an injunction should be granted and the question whether the restriction was ineffective. In *JA Mont* [59] a restraint was entered into at termination of the contract. The employer agreed to pay the ex-employee what seemed to be equal to what he

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[57]. Infra Ch 14.
[58]. See infra Ch 11.
[59]. JA Mont (UK) Ltd v Mills [1993] FSR 577 at 587.

would have received during employment. The court emphasised the formal divisions and accepted that the distinctions between post-employment restraints and restraints that run during employment could not be "blurred". However, there is perhaps good reason for not taking too formalistic a view when it comes to classification. Some of the factors discussed by the court in *GFI* [60] typically belong to the analysis of the legality of post-employment restraints. The court stressed that customer connections were protected here. Much was made of the question whether the duration of the notice period was necessary for the protection of the covenantee. It might therefore be that the courts are in some cases moving towards treating some of these cases in a manner that is somewhat similar to their treatment of post-employment contracts.

2. Post-partnership covenants [61]

The majority of cases concern sale of business and post-employment restraints, but there is considerable authority on post-partnership restraints and these clauses can also be described as classical. However, they can be discussed only now, as the rules and principles that apply to them are constructed on the foundations of the other classical types of restraints.

There is apparent authority for the view that the partnerships will be dealt with in the same manner as sales of businesses [62]. Nevertheless this is unacceptable (in so far as it has been expressly taken by the authorities [63]). It has been argued that partnerships, like sales of businesses, are often concluded on an equal footing and that post-partnerships restraints should therefore be treated like sale of business restraints. The resemblance has then been contrasted with the position in post-employment restraints where the parties are, supposedly, often in a position of unequal bargaining power [64]. However, bargaining power cannot be useful here. Differences regarding bargaining

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60. GFI Group Inc v Eaglestone FSR [1994] 535.

61. See also restrictions in partnership agreements: Leighton v Wales (1838) 3 M & W 545; Atkyns v Kinnier (1850) 4 Exch 776; Wolmerhausen v O'Connor (1877) 36 LT 921; Issit and Jenks v Ganson (1899) 43 Sol Jo 744; Townsend v Jarman [1900] 2 Ch 698; Harris v Mansbridge (1900) 17 TLR 21; Rayner v Pegler [1964] EG 301, 967; Peyton v Mindham [1971] 3 All ER 1215; Oswald Hickson Collier & Co v Carter-Ruck [1984] AC 720; Edwards v Worboys [1984] AC 724; Meikle v Meikle (1895) 3 SLT 204; Dallas McMillan v Simpson 1989 SLT 454; McBryde 595-600; Miller *Partnership* 119-121; Steyn v Malherbe 1967 (2) PH A.43 50; Savage and Pugh v Knox 1955 (3) SA 149 (N); Book v Davidson 1989 (1) SA 638 (ZS).

62. Nordenfelt 566; Spink (Bournemouth) Ltd v Spink [1936] Ch 544 distinguished a partnership restraint from a post-employment restraint although the court did not say that all partnership restraints will be treated like sale of goodwill restraints; Whitehill v Bradford [1952] Ch 236 at 246; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 272; Cheshire Fifoot and Furmston 400 although the statement is limited to "professional partners"; Heydon 201; Walker 187; Gloag 571; Miller *Partnership* 120-123; See infra.

63. McBryde 599-600 noted that such a notion exists but stated that it depended on the facts; Miller *Partnership* 120-123; Christie 443 goes no further than stating that many post-partnership restraints will be goodwill oriented; Cf Trebilcock 63 cannot be accepted; There is a suggestion of this in Halliwell v Laverack 1929 WLD 175 at 180.

64. See Nordenfelt 566 and Attwood v Lamont [1920] 3 KB 571 at 586; Trebilcock 63; It can be deduced from Cheshire Fifoot and Furmston 400; See counsel in Dallas McMillan v Simpson 1989 SLT 454 at 456; McBryde

power cannot form the basis of the distinction between restraints in sales of goodwill and post-employment restraints [65]. The association of partnership restraints with any one of the other two types of classic restraints cannot hinge on it. Moreover, where a junior partner joins a partnership, he will often not be in a strong bargaining position [66]; thus partnership contracts cannot be automatically associated with any one of the two other classic types of restraints on this basis.

There is no other ground upon which partnership restraints can be consistently associated with any of the above mentioned two types of restraints [67]. In *Bridge* [68] the court therefore correctly discarded the notion that they should be dealt with like either sales of businesses or post-employment restraints.

However, the court probably went too far. Lord Fraser held that legitimate interests that could be protected in a particular case had to be determined by looking at the object of that particular transaction [69]. But it will be helpful to the development of partnership restraints if the vast corpus of knowledge that exists on sale of business and post-employment restraints can be applied here [70]. The *Bridge* approach should accordingly be qualified. When a partnership restraint comes before the court, three possible avenues should be open to the judge.

2.1. Partnership restraints that should be dealt with like sale of business restraints

A restraint should, on a substantive level, be dealt with in the same manner as a sale of business restraint if it is central to a scheme by which a transfer of business is organised [71]. Sale of business substantive principles should apply - and the protection of goodwill allowed [72] - if a partner has a

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600; See also on bargaining power: Whitehill v Bradford [1952] Ch 236 at 246; Anthony v Rennie 1981 (Notes) 11 at 12; Vermeulen v Smit 1946 TPD 219 at 221, Steyn v Malherbe 1967 (2) PH A.43 151.

65. Supra 1.1.

66. Cf Bridge v Deacons [1984] AC 705 at 716.

67. The view expressed in New York case of Lynch v Bailey (1949) 90 NYS 2d 359 that all such restraints should be treated like employment restrictions is therefore also unacceptable.

68. Bridge v Deacons [1984] AC 705 714; See McBryde 600.

69. Miller *Partnership* 121.

70. See Miller *Partnership* 121-122.

71. Miller *Partnership* 122; In some cases the facts are particularly close to a sale of business: Williams v Williams (1818) 2 Swan 253, Rolfe v Rolfe (1846) 15 Sim 88, Price v Green (1847) 16 M & W 346, Tallis v Tallis (1853) 1 E & B 391, Wolmerhausen v O'Connor (1877) 36 LT 921, See also infra Ch 9.2, Spink (Bournemouth) Ltd v Spink [1936] Ch 544 at 547, Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 270.

72. Whitehill v Bradford [1952] Ch 236 at 246, 253-254, See Lindley 10-179; Bridge v Deacons [1984] AC 705 at 714ff although the goodwill issue was not sufficiently emphasised; Kerr v Morris [1987] 1 Ch 90 at 107ff, See also 114-115; See Lindley 10-179; Although not explicitly Anthony v Rennie 1981 (Notes) 11 at 12; Cameron v Mathieson 1994 GWD 29-1740; Vermeulen v Smit 1946 TPD 219 at 221; Hermer v Fisher 1960 (2) SA 650 (T) especially 656; Steyn v Malherbe 1967 (2) PH A.43 151; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 250, 252 although the court took a too narrow view of goodwill.

proprietary interest in the business of the partnership and the dominant aim of the restraint is to transfer that interest if he leaves the partnership.

Two aspects that may be relevant to this question have been discussed by the courts.

- It may be of evidential importance that all partners are equally bound to the restraint, although it will neither be a necessary nor a conclusive requirement for treating a post-partnership restraint as a sale of business [73]. The court in *Bridge* [74] considered two factors that it regarded as important for allowing the protection of goodwill. The restraint applied equally to all partners and partners all owned the assets of the partnership.
- It may be of importance that money is paid by a partner entering the partnership or to a partner leaving it, although the importance of this factor will be limited. In *Bridge* [75] the court did not give much weight to the argument that goodwill would be bought for a minimal sum at termination of the partnership, because it accepted that the partner also entered the partnership without having to pay much.

Where a restraint mirrors a sale of business restraint and goodwill is protected, one apparent theoretical anomaly will exist. The partner does not own all goodwill; how can he be restricted from interfering with the goodwill of the partnership in toto? However, this conundrum can be solved. The law does not make a concrete distinction, and it will generally be impossible to distinguish between one partner's real share of the goodwill and that of another. A partner has a percentage share in the whole [76]. It might be argued that this can work unfairly in a case where a partner is restricted from interfering with any goodwill of the partnership but had only a small interest in it. But such cases will more closely resemble post-employment restraints and only different, more narrow, interests will then be protectable.

2.2. Restraints in partnerships that should be dealt with like post-employment restraints

Post-employment principles should be applied to post-partnership restrictions that emulate post-employment restraints [77]. Only narrower interests should be protectable where the partnership agreement is intended to protect the remaining partners against later interference made possible by the covenantor's participation in the partnership. An example of such a restraint will exist where

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[73]. Miller *Partnership* 122-123 although the author placed too much emphasis on this issue see supra Ch 6.10.
[74]. Bridge v Deacons [1984] AC 705 at 716.
[75]. Bridge v Deacons [1984] AC 705 at 716.
[76]. Cf Bridge v Deacons [1984] AC 705 at 716-717; Lindley 10-180.
[77]. See Lindley 10-176, See 10-179 is unacceptable.

the partner does not really share in the assets and control of the partnership, or where the partnership is hierarchically structured and the partner is very low on this ladder.

2.3. Partnership principles and restraints on shareholders

An analogy with partnership cases will often be apposite where restraints are imposed on shareholders in a company. There might be cases concerning restraints of trade where the court would lift the corporate veil for the purpose of exposing a partnership [78]. The position of shareholders, especially in smaller companies, will frequently be similar to those of partners, and these cases should for the purpose of the doctrine be treated like partnership covenants [79]. Courts cannot lift the veil as a matter of course, but formalism should be avoided when it comes to the determination of public policy questions. A difficult question then arises if the position of a shareholder can be compared to that of a partner in a particular case. It must still be determined whether the covenantor should be treated as a seller of goodwill or as an employee.

There are cases where companies are interposed that closely match partnerships of the former type [80]. Some judges did not appreciate the resemblance with partnerships that emulate sales of goodwill [81]. But other courts have accepted that investment could be protected here [82], although the proper theoretical analogy was seldom drawn [83].

There are probably also cases where lifting the veil will expose no more than a partner-employee covenant [84]. But the courts have not taken an acceptable view in any of these cases:

- *David Wuhl* simply equated the restraint with a post-employment restriction [85]. This will mostly lead to similar answers but it might sometimes be necessary to draw finer distinctions.
- In *Super Safes* the court held [86]:

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78. See supra 1.2.
79. See Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 383; Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 786 but see the criticism infra.
80. WAC Ltd v Whillock 1990 SLT 213 at 216ff; Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R); Basson v Chilwan 1993 (3) SA 742 (A).
81. Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 347-348; Basson v Chilwan 1993 (3) SA 742 (A) 771-772, See 778.
82. WAC Ltd v Whillock 1990 SLT 213.
83. Basson v Chilwan 1993 (3) SA 742 (A) 757, 764, Van Heerden JA 775-776 who placed much emphasis on these notions, Nienaber JA 766 accepted that the relationship had some partnership elements but it was not built upon; Cf Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 238 where a proper analogy was almost drawn.
84. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 383; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W); Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W).
85. David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 435-436.
86. Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 786.

> "Where it can be shown that shareholders are de facto carrying on a partnership by means of the machinery of a limited liability company, it may well be that the reasonableness of the restraint as between the shareholders and between them and the company will fall to be dealt with as if the restraint were one agreed upon between partners."

Nevertheless, it then argued that there was not sufficient material before it to say that this was the position in casu. It is correct to accept that these restraints can be dealt with like partnerships; however, the conclusion of the court regarding proof is questionable. Clearly the business here closely emulated some sort of partnership.

- In *Systems Reliability* [87] the court accepted an analogy with partnerships and then relied on *Bridge v Deacons*, stating that competition could be restricted. In other words, the court decided that the goodwill of the business could be protected against the vendor of shares.

2.4. The position where the post-partnership restraint does not clearly fall in either of the above mentioned categories

The court will have to fall back on general principles in cases where the partnership restraint is quite different from either post-employment or sale of business cases. It will then have to work out which interests can be protected in the particular case on the basis of the principles that have been expressed above. However, cases of this nature will seldom emerge. Although partnership restrictions cannot be completely assimilated with one type of restraint or the other, courts will often have little difficulty in drawing analogies.

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87. Supra.

Chapter 8

The techniques for limiting the scope of restraints of trade

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1. Techniques for limiting the applicability of a restraint to legitimate interests

The great advantage of a restraint is that parties will be able to create special enclaves of protection that will extend beyond anything that the common law will give [1]. Courts will have to determine the validity of a restraint by looking at the manner in which this has been achieved. From the judges' perspectives it will be pivotal to determine if these exclusion spheres correspond with the legitimate interests of the covenantee [2]. Three aspects of restraints will come under scrutiny [3]. Restrictions can be limited as to time, space, and activity.

2. Vagueness and discretions

The techniques will have to be used in a manner which does not make the restraint void for vagueness [4]. The general vagueness principles will apply here. The court will have to look at every case to see whether the wording is sufficiently precise.

One possible technique for limiting the scope of restraints has been found to be too vague in all cases. A restraint may not be concluded on the basis that it will be valid as far as the law allows [5]. But policy will also come into it. Marsh [6] submitted that the real reason why such covenants will

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[1]. Rautenbach & Reinecke 561 cannot be accepted.

[2]. For authorities where this was not properly related to interests: Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 442, Van der Merwe 158; See Walker 185.

[3]. JA Mont (UK) Ltd v Mills [1993] FSR 577 at 590; Blake 675; Davies 497; Whish *Stair Encyclopaedia* 1210; Wilkinson v Wiggill 1939 NPD 4 at 15.

[4]. Marshalls Ltd v Leek (1900) 17 TLR 26; Beetham v Fraser (1904) 21 TLR 8; Reeve v Marsh (1906) 23 TLR 24; Whitmore v King (1919) 119 LT 533 at 536; Stride v Martin (1897) 77 LT 600; Mason 730, 736, 743-744; Bowler v Lovegrove [1921] 1 Ch 642 at 648; Express Dairy Co Ltd v Jackson (1930) 46 TLR 147; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 946-948, 949, 959, 963, 967 although the reasonableness and certainty questions were not always kept apart; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 189; Jenkins v Reid [1948] 1 All ER 471 at 481; Electric Transmission Ltd v Dannenberg (1949) 66 RPC 183 at 186, 187; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1376; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 281; Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498 at 504; Spafax (1965) Ltd v Dommett (1972) 116 Sol Jo 711 and Financial Collection Agencies (UK) Ltd v Batey (1973) 117 Sol Jo 416; See Berlitz School of Languages Ltd v Duchene (1903) 6 F 181 at 187; The court in Rodger v Herbertson 1909 SC 256 at 265 did not see its way clear to discuss this issue before proof; Mulvein v Murray 1908 SC 528 at 534 and see 531 where the court looked at uncertainty as a factor that influences reasonableness; Kilgour v McNicol 1961 SLT ShCt 8 at 10; Apparently Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 73; Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at 357; WAC Ltd v Whillock 1990 SLT 213 at 217; Walker 183; Christie *Jur Rev* 291; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 612; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 250; Wohlman v Buron 1970 (2) SA 760 (C) 762; Carthew-Gabriel v Fox and Carney (Pvt) Ltd 1978 (1) SA 598 (RA), See Christie 447, and see 440 on the possibility of saving such a restraint.

[5]. Davies v Davies (1887) 36 ChD 359 at 387-388, 392-394, 395-396, 399, Cf a quo 373; Express Dairy Co Ltd v Jackson (1930) 99 LJKB 181; Chitty 1200; Lindley 10-182; Notes (1888) 14 *LQR* 240; Winfield (1946) 327; Treitel 408.

[6]. Marsh 367.

not be upheld is that the courts do not want to force a person into performing an illegal contract in practice - if not in theory. The author probably meant that such a clause is unacceptable as it would allow the covenantee to insist on enforcement without being properly confined by a precise contractual clause, and this is certainly an important ground for not enforcing such clauses. Yet, it is probably too one-dimensional to state that this second ground is the real reason why such contracts cannot be upheld. The issue mentioned by Marsh will be an important further policy reason for not upholding them.

However, this second ground mentioned by Marsh [7] will really come into its own in restraints that provide for a discretion or the consent of the covenantee [8]. There is considerable authority for not upholding a restraint which is unreasonable in other respects if it contains a clause according to which a covenantor may perform some of the prohibited work activities with the consent of the covenantee [9]. It will not make a difference even if it is stipulated that such consent may not be unreasonably withheld [10]. If such clauses are allowed, it will make the covenantee a judge in his own cause and there is a strong possibility that he may refuse to consent to an activity that cannot be restricted by a direct restraint [11].

However, this does not mean that such clauses will always lead to the ineffectiveness of a restraint. Such a discretion will be valid where it is so limited that it can only be withheld in cases where it would, in any event, be reasonable to restrict the covenantor [12]. It has sometimes even been

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[7]. Marsh 367 with reference also to JW Chafer Ltd v Lilley [1947] LJR 231 see infra.

[8]. See also Edwards v Worboys [1984] 1 AC 724 infra Ch 15.

[9]. Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 201.

[10]. Perls v Saalfeld [1892] 2 Ch 149 especially at 152, 153 and 156; JW Chafer Ltd v Lilley [1947] LJR 231 at 234; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 343; Chitty 1203; Heydon 163-164; Christie *Jur Rev* 301; Winfield (1946) 327.

[11]. For further cases where the court did not even consider consent clauses as a means of saving restraints of trade: Baker v Hedgecock (1888) 39 ChD 520; Woods v Thornburn (1897) 41 Sol Jo 756; Whitmore v King (1919) 119 LT 533; Reeve v Marsh (1906) 23 TLR 24; Henry Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch 189, 322; Morris & Co v Ryle (1910) 26 TLR 678; SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1; Vandervell Products Ltd v McLeod [1957] RPC 185; Stenhouse Australia Ltd v Phillips [1974] AC 391 see clause 6; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273; The Marley Tile Co Ltd v Johnson [1982] IRLR 75; Randev v Pattar 1985 SLT 270; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450; SA Breweries Ltd v Muriel (1905) 26 NLR 362; Sellers v Eliovson 1985 (1) SA 263 (W); Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C).

[12]. Inherent in Perls ibid; Cases where restraints were upheld despite consent clauses and where the issue was not even discussed by the court are: Homer v Ashford and Ainsworth (1825) 3 Bing 322; Whittaker v Howe (1841) 3 Beav 383; Mallan v May (1843) 11 M & W 653; Hastings v Whitley (1848) 2 Exch 611 where the consent clause was considered for other reasons; Richards v Whitham (1892) 66 LT 695; Haynes v Doman [1899] 2 Ch 13; Rannie v Irvine (1844) 7 Man & G 969; Showell v Winkup (1889) 60 LT 389 and see the analysis of other aspects of such clauses; Phillips v Stevens (1899) 15 TLR 325; William Robinson & Co Ltd v Heuer [1898] 2 Ch 451; Gilford Motor Co Ltd v Horne [1933] 1 Ch 935; Stenhouse Australia Ltd v Phillips [1974] AC 391; Lawrence David Ltd v Ashton [1989] ICR 123; Rodger v Herbertson 1909 SC 256; Taylor v Campbell 1926 SLT 260; GFI Group Inc v Eaglestone [1994] FSR 535 at 538; Bluebell Apparel Ltd v Dickinson 1978 SC 16; SOS Bureau Ltd v Payne 1982

considered as a factor persuading the court that a restraint, doubtful in other respects, is reasonable [13]. Hence, it is not acceptable to aver that these clauses are always void for vagueness [14].

In South Africa the court in *Tension Envelopes* refused to enforce a restraint where the parties agreed that the employer at termination of employment would nominate one competitor for whom the employee would not be allowed to work [15]. But the judge accepted that this clause was too wide because there were no protectable interests. He was apparently not critical of the use of discretion. Discretion and consent clauses in South Africa will probably be subject to the same rules and principles as in English and Scots law. Reasonableness in South Africa is determined at the time when the court is asked to enforce the restraint, but this will probably not impact on this issue. The courts should not allow the exercise of discretions that may lead to ineffectiveness, even if they are in the end properly exercised in a particular case.

3. Spatial limitations

A restraint must be limited to the area where it is necessary for the protection of the legitimate interests of the covenantee [16]. A restraint will naturally be too wide where it extends beyond any sphere of activity and any interest of the covenantee [17]. But after *Mason* spatial restraints will also have to be further limited. They will have to be restricted to the legitimate interests of the

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SLT ShCt 33; See also Harben Pumps (Scotland) Ltd v Lafferty 1989 SLT 752 where a consent clause was included in an interdict based on the implied duty not to disclose or use trade secrets; Empire Theatres Co Ltd v Lamor 1910 WLD 289; Estate Matthews v Redelinghuys 1927 WLD 307; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR); Sellers v Eliovson 1985 (1) SA 263 (W).

13. Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 240, 241, Cf Haynes v Doman [1899] 2 Ch 13 at 26, Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 448-449.

14. Heydon 164 cannot be accepted; See more carefully Chitty 1204.

15. Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W).

16. Cf Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 405 did not properly relate interests to the spatial restraint.

17. Horner v Graves (1831) 7 Bing 735 at 744; Ward v Byrne (1839) 5 M & W 548 at 560; Price v Green (1847) 16 M & W 346 at 352; The statement in Tallis v Tallis (1853) 1 E & B 391 at 411 is therefore too wide; Davies Turner & Co v Lowen (1891) 64 LT 655 at 656; Hooper & Ashby v Willis (1905) 21 TLR 691, (1906) 22 TLR 451; Stuart and Simpson v Halstead (1911) 55 Sol Jo 598 at 599, Heydon 145; Continental Tyre and Rubber (Great Britain) Co Ltd v Heath (1913) 29 TLR 308 at 310; SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 at 423ff; Empire Meat Co Ltd v Patrick [1939] 2 All ER 85 especially 93-94; Dickson v Jones [1939] 3 All ER 182 at 189; Spencer v Marchington [1988] IRLR 392 at 395; Anson 326; Heydon 145-146; Minimax Ltd v Geddes (1914) 31 ShCt Rep 36 at 40; Dallas McMillan v Simpson 1989 SLT 454 456-457; See counsel Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71; Cf Dempsey v Shambo 1936 EDL 330 at 335-336 will have to be approached with caution; Ex Parte Spring 1951 (3) SA 475 (C) 481; U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 147-148; Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W) 859; Christie 446, 447.

covenantee, which will necessarily mean that restraints will sometimes have to be narrower than the sphere of business of the covenantee [18].

Spatial reasonableness will depend on the facts of a particular case, and parties must be careful to lay down spatial limitations with reference to a particular case. In *Malden* [19] a spatial restraint was placed on a branch manager. The spatial restraint was related to the branch where he was employed. However, he then became area manager and the restraint, to an extent, became senseless, because the area in which he worked took on a completely different nature.

Where the restraint is aimed at protecting customer connections, it must only restrict the employee in an area within which he can interfere with customer connections of the employer as a result of his previous position as employee. There are post-employment cases that fall into this category where the courts accepted that the area had to be limited to the geographical sphere within which the employer operated [20]. But such protection will be acceptable only where all customers will be customer connections [21], or where interference within the whole area of the business will create the possibility that customers are taken away because of influence gained over them by the employee during employment [22]. Clauses based on the sphere of activity of the employer will clearly be too wide for the protection of trade connections in cases where the covenantor only operated in a particular section of that area [23], or where the duration of the contract was too short - or would foreseeably be too short in England and Scotland - for the employee to strike up contacts with customers throughout the area [24].

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18. Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 688-689 cannot be accepted.
19. Malden Timber Ltd v McLeish 1992 SLT 727 at 733.
20. E.g. Hayward v Young (1818) 2 Chit 407, Delius v Muller (1901) 45 Sol Jo 737; See Heydon 144-145, Blake 642-643; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 614.
21. See e.g. Nachtsheim v Overath 1968 (2) SA 270 (C) 274-275.
22. Cf Steyn v Malherbe 1967 (2) PH A.43 150 at 152 although it is a partnership case.
23. Cf already the restraint of trade clause Homer v Ashford and Ainsworth (1825) 3 Bing 322; Mason 734 but the principle had not yet fully developed, 743, Cf also the comment 737; Eastes v Russ [1914] 1 Ch 468 at 490 where the foundation was laid; Clarke Sharp & Co Ltd v Solomon (1920) 37 TLR 176 at 177f although not discussed in terms of customer connections; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1422, 1424, 1427; The Marley Tile Co Ltd v Johnson [1982] IRLR 75 at 77; Blake 660 and especially 680; Heydon 146ff; Although not yet fully developed see British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68, Mulvein v Murray 1908 SC 528 at 532; Remington Typewriter Co v Sim (1915) 1 SLT 168 at 170; Kilgour v McNicol 1961 SLT ShCt 8 at 10; Cf Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248 where a wider restraint was justified on other grounds; Aling and Streak v Olivier 1949 (1) SA 215 (T) 223; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 75; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 68 although it may also have been illegal because it was wider than any interest of the covenantee, See Kerr 517; Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W) 859 but see the argument here.
24. Aling and Streak v Olivier 1949 (1) SA 215 at 223ff, But see the criticism infra Ch 9.9.

In sale of business cases the restraint may not be spatially wider than the interests of the buyer [25]. But this will not be the only requirement. Where the protectable interest is goodwill, the restraint must not be geographically wider than the goodwill of the business sold [26]. Wider geographical operation than in post-employment restraint for the protection of customer connections often will be allowed where the restraint of trade is aimed at protecting goodwill in a sale of a business [27].

Where the aim is to protect customer connections or goodwill, one of the factors that will have a marked effect on the justifiable geographical width of the restraint is whether business requires direct personal contact with customers [28]. Where personal contact is required, the spatial limits of the restraint will probably have to be more narrowly drawn, and this may become particularly important in the electronic age.

If the parties aim at protecting a trade secret, the covenant will have to be limited to the area within which that trade secret can be used or disclosed to the detriment of the covenantee. In these cases the court will frequently allow wide geographical restriction [29]. Use and especially disclosure of a trade secret within a very wide area will often still interfere with the legitimate interests of the covenantee, while it will be very difficult to guard trade secrets in any other manner than by geographical restriction of wider work activities [30]. Blake [31] argued that spatial limitation will play no role here because a trade secret will be destroyed wherever it is disclosed. However, this cannot be accepted as a general principle. In some cases trade secrets will have to be substantially

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[25]. Goldsoll v Goldman [1915] 1 Ch 292 at 297, 298-299, 300; Dumbarton Steamship Co Ltd v MacFarlane (1899) 1 F 993 at 996-997, 997, 998.

[26]. Nordenfelt 548-549; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 574; Pellow v Ivey (1933) 49 TLR 422 at 423 but a too narrow view of goodwill was taken; D Bates & Co v Dale [1937] 3 All ER 650 at 654-655; Connors Brothers Ltd v Connors [1940] 4 All ER 179 at 192-194; Atiyah 340; Cheshire Fifoot and Furmston 412; Trebilcock 239; Apparently Kennedy v Clark (1917) 33 ShCt Rep 136 at 138; Estate Fisher v Bradley 1931 CPD 46 at 48; Katz v Efthimiou 1948 (4) SA 603 (O) 614; Schwartz v Subel 1948 (2) SA 983 (T) 989; Weinberg v Mervis 1953 (3) SA 863 (C) 870 some provision will especially be allowed for future expansion; See Berger v Osher 1965 (1) SA 558 (W) 559; Cf Cowan v Pomeroy 1952 (3) SA 645 (C) 650 where no final decision was made; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 108, 109; Wohlman v Buron 1970 (2) SA 760 (C) 763; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 252.

[27]. Connors Brothers Ltd v Connors [1940] 4 All ER 179 at 194; See however Heydon 195 with reference to Harms v Parsons (1862) 32 Beav 328; Woolman 254 although it is not always clear; Forman v Barnett 1941 WLD 54 at 62ff; Weinberg v Mervis 1953 (3) SA 863 (C) 869-870.

[28]. Horner v Graves (1831) 7 Bing 735 at 744, Heydon 196; See Isitt and Jenks v Ganson (1899) 43 Sol Jo 744.

[29]. Bryson v Whitehead (1822) 1 Sim & St 74, Allsopp v Wheatcroft (1873) LR 15 Eq 59 64-65, See Heydon 156, Lindley 10-181; White, Tomkins and Courage v Wilson (1907) 23 TLR 469; Caribonum Co Ltd v Le Couch (1913) 109 LT 385 and see the appeal 109 LT 587, See Gooderson 422; Forster & Sons Ltd v Suggett (1918) 35 TLR 87 discussed Anson 327-328, Marchon Products Ltd v Thornes (1954) 71 RPC 445, Kerchiss v Colora Printing Inks Ltd [1960] RPC 235, A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299; Bluebell Apparel Ltd v Dickinson 1978 SC 16; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 437.

[30]. Lindley 10-181.

[31]. Blake 679; Heydon 156; Trebilcock 90.

hemmed in on the spatial level [32]. The court will not allow protection against the remote contingency that the covenantor can harm the covenantee by use or disclosure of trade secrets through working in a wide area:

- Only narrow protection will be allowed if the secret is less valuable or important [33].
- It may be asked whether the covenantee will do business in the entire area [34]. But too much emphasis was placed on this in the courts.

The courts must refrain from attempting to determine reasonableness with too much precision. The spatial sphere within which an interest will exist can seldom be precisely delineated [35]. Some useful rules of thumb have developed.

The interests will not normally have to exist in every nook and cranny of the restricted area . It will merely have to be shown that it had sufficient prevalence in the area. In sale of goodwill cases, courts have accepted that it is not necessary to show that the trade has been practised in all parts of the restricted area [36], and the point has also been made in post-employment cases although it must be approached with more caution there [37]. Wide restraints will be justifiable where a wide area is sparsely populated by customers and potential customers in sales of goodwill, or protectable customers in employment cases [38], and this will be particularly true where the customers are valuable [39]. However a restraint will not be allowed over an area where there are many potential customers for the covenantor who are not protectable as either goodwill in sale of

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[32]. Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 644-645; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 see especially 426-427, 433, 435, Treitel 407; Malden Timber Ltd v McLeish 1992 SLT 727 at 733.

[33]. Farwell 69.

[34]. Cf Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 450; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 241; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 426-427; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 22-23; Gurry 213-214, See also 217; A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299.

[35]. Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 369; Christie 447.

[36]. Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 369; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 194 see the discussion Cheshire Fifoot and Furmston 409; Heydon 193-194, Cf 145; Walker 185; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 108.

[37]. Ropeways Ltd v Hoyle (1919) 120 LT 538 at 542; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 241, Discussed Gurry 214 but see the criticism supra; Cf U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 147-148.

[38]. Population was already regarded as important in Proctor v Sargent (1840) 2 Man & G 20 at 33; Contra Mallan v May (1843) 11 M & W 653 at 667; Dickson v Jones [1939] 3 All ER 182 at 191; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 194; Lewin v Sanders 1937 SR 147 at 153; Wohlman v Buron 1970 (2) SA 760 (C) 763.

[39]. Nordenfelt mentioned in Lindley 10-181; Harvey v Corpe (1885) 79 LT Jo 246; See Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 241; The argument of counsel in Spencer v Marchington [1988] IRLR 392 at 395; Heydon 195; Dempsey v Shambo 1936 EDL 330 at 335; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 614; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 237.

goodwill cases or customer connections in post-employment cases [40]. The courts will in post-employment cases often require narrower types of restraints where this is the position [41].

In post-employment cases the courts will not allow restrictions over outlying areas where the employer has very few protectable customers [42], and the same will probably apply in a sale of a business case where there is only limited business or potential business on the periphery [43]. The parties should refrain from including areas on the periphery of the spatial restraint, where it carries on limited activities, if such areas are populous and contain many potential customers for the covenantor [44]. But protection on the fringes will be allowed, where there are important protectable customers in post-employment cases or valuable business in sale of business cases, even if most of the activities of the business take place within a smaller area [45].

Two important types of spatial restraints must always be distinguished. A restraint may exclude certain business activities within a particular sphere [46], or a covenantor may be restricted from setting up a business from a particular base within a certain area (so-called brass plate covenants). The scope of such clauses will differ widely, and reasonableness will be determined differently in each type of case, though it may often be difficult to distinguish the different types of contracts [47]. The first type is most common; the court will in these cases have to determine whether the restricted activity will interfere with legitimate interests of the covenantee if carried on within the restricted area. In the second type of case a different approach will have to be followed. The court will have to consider whether the restricted activities from the prohibited places for setting up a

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[40]. Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1373-1374, 1376, 1377, Gurry 217; Fellowes & Son v Fisher [1976] QB 122 at 129; Blake 679-680.

[41]. See infra 5.4; Heydon 148-149.

[42]. Probably Great Western & Metropolitan Dairies Ltd v Gibbs (1918) 34 TLR 344; Empire Meat Co Ltd v Patrick [1939] 2 All ER 85 at 93-94 with reference to Edward & James Ltd v Lakin Senior (1926) July 21 (unreported); Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1299-1300, See counsel at 1297; Heydon 148; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 404 cannot be accepted the position of the covenantor is not relevant here.

[43]. Left open in Cowan v Pomeroy 1952 (3) SA 645 (C) 650; Cf Dempsey v Shambo 1936 EDL 330 at 336-337 placed too much emphasis on these customers.

[44]. Hitchcock v Coker (1837) 6 Ad & E 438 at 454; D Bates & Co v Dale [1937] 3 All ER 650 at 654, 655; Heydon 149 with reference to HJ Willet Ltd v Beasly (1923) 58 L Jo 535; Cf Tivoli Manchester Ltd v Colley (1904) 20 TLR 437 at 438 where populousness and accessibility were considered as factors justifying a performer's restraint.

[45]. Whitehill v Bradford [1952] Ch 236 at 250, See Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1299-1300 and the arguments of counsel 1297; Jenkins v Reid [1948] 1 All ER 471 at 480 although the court was very cautious; Heydon 197; Lewin v Sanders 1937 SR 147 at 153.

[46]. See when this will be the case: Cullard v Taylor (1887) 3 TLR 698; Marion White Ltd v Francis [1972] 3 All ER 857 at 861-862.

[47]. Whitehill v Bradford [1952] 1 Ch 236 at 253; Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1299 and the reference to Robertson v Buchanan (1904) 73 LJCh 408, Cf the criticism Whitehill 242; Kerr v Morris [1987] Ch 90 at 101; Spencer v Marchington [1988] IRLR 392 at 395ff where this was not properly recognised by the court; Lindley 10-182; Spowart-Taylor & Hough 746-747, 750; Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W) 310-311; Groenewald v Conradie 1957 (3) SA 413 (C) 415.

business will interfere with legitimate interests. In these cases the actual sphere within which activities are restricted may be much wider. The most acceptable type of spatial restraint will depend on the facts of the case.

It has been stated that distance will be determined as the crow flies where a restraint operates within a distance from a certain fixed point [48]. However, this rule should not be slavishly followed. It was deduced from the interpretation of clauses, and courts should bow to a clause that is open to a different interpretation [49]. It may change depending on the words used in the contract or the circumstances in which the contract is concluded [50].

4. Temporal limitations upon the operation of a particular restraint

Time restrictions will be pivotal in ensuring that restraints do not exceed legitimate interests. Some authorities have not made a clear connection between interests of the covenantee and the reasonableness of duration [51]. But the most acceptable approach theoretically is to link them [52]. A restraint may only endure for as long as it will take for the "risk of injury to be reasonably moderated" [53].

It is, frequently, almost impossible to determine precisely the duration for which an interest will exist. In *Stenhouse Australia Ltd* [54] Lord Wilberforce stated that:

> "It is for the judge, after informing himself as fully as he can of the facts and circumstances relating to the employer's business, the nature of the employer's

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[48]. Leigh v Hind (1829) 9 B & C 774; Duignan v Walker (1859) Johns 446; Mouflet v Cole (1872) 8 LR Exch 32 at 33; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1524; Heydon 152; Winfield (1946) 331; Lindley 10-181; Chitty 1209; Cf the earlier authorities contra: Woods v Dennett (1817) 2 Stark 89, Leigh v Hind (1829) 9 B & C 774 per the majority; Rogaly v Weingartz 1954 (3) SA 791 (D) 792; Kerr 522; Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 689.

[49]. Atkyns v Kinnier (1850) 4 Exch 776 although the decision in this case was probably meant to be of wider import; Mouflet v Cole (1872) LR 7 Exch 32 especially at 36; Kerr 521-522; Cf as to cases where the parties expressly adopted different means of measurement: Robertson v Buchanan (1904) 73 LJCh 408, Smith v Hancock [1894] 2 Ch 377; Heydon ibid.

[50]. Kerr 522 with reference to Malan v Van Jaarsveld 1972 (2) SA 243 (C) especially 251-252, See Christie 446.

[51]. Hooper & Ashby v Willis (1905) 21 TLR 691 at 692 although it might be the brevity of the report; Davies Turner and Co v Lowen (1891) 64 LT 655; Mulvein v Murray 1908 SC 528 at 534; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 23; Steiner v Breslin 1979 SLT (Notes) 34 at 35; Thompson v Nortier 1931 OPD 147 at 153-154.

[52]. Eastes v Russ [1914] 1 Ch 468 at 476, 487; Scott Robinson 160 stated that duration should "to *some extent* be linked to the interests to be protected" (my italics). But it can be more strongly put; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503.

[53]. Blake 677.

[54]. Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1159 see counsel.

> interests to be protected, and the likely effect on this of solicitation, to decide whether the contractual period is reasonable or not. An opinion as to the reasonableness of elements of it, particularly of the time during which it is to run, can seldom be precise, and can only be formed on a broad and common sense view."

Woolman [55] argued that general guidelines should be laid down. However, the decision on the exact length of one restraint can only be marginally relevant in another [56].

Two issues will be important where trade connections are protected. The restraint may not be longer than the foreseeable duration (although the issue will be determined from a different point in South Africa) of customer relationships with the employer [57]. Yet this will not be sufficient. The courts should consider how long it will take for the covenantor to lose the hold gained over customers because of his employment [58]. The view expressed by the court in *Stenhouse Australia Ltd* [59] should be kept in mind:

> "The question is not how long the employee could be expected to enjoy, by virtue of his employment, a competitive edge over others seeking the clients' business. It is rather what is a reasonable time during which the employer is entitled to protection against solicitation of clients with whom the employee had contact and influence during employment and who were not bound to the employer by contract or by stability of association".

In this equation it will be important that the restraint should be for "no longer than necessary for the employer to put a new man on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers" [60].

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[55]. Woolman 258, See 255 is also sometimes too rigid; Cf Lewin v Sanders 1937 SR 147 at 152-153.

[56]. Fitch v Dewes [1921] 2 AC 158 at 163 and 166-167; M & S Drapers v Reynolds [1956] 3 All ER 814; Dairy Crest Ltd v Pigott [1989] ICR 92 at 94-95 and the criticism of the court a quo; Farwell 69; Heydon 161; McBryde 601; Christie 446-447; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1105.

[57]. M & S Drapers v Reynolds [1956] 3 All ER 814 at 819-820; Luck v Davenport-Smith [1977] EG 73 at 90 although the argument was not fully developed here; Kilgour v McNicol 1961 SLT ShCt 8 at 9-10; Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 688.

[58]. Eastes v Russ [1914] 1 Ch 468 at 490; Fitch v Dewes [1921] 2 AC 158 at 163-166 although the court took a too wide view; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Anson 327; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 436 although the argument was introduced by counsel and though the court had some doubt about the factual support; Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 688 although other aspects were more important here and though this aspect was not properly considered; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 544.

[59]. Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402, Cf Trebilcock 104-106 does not appear to take an acceptable view of this dictum.

[60]. Blake 677; Already mentioned: Middleton v Brown (1878) 47 LJCh 411 at 413, See Heydon 158, Proctor v Sargent (1840) 2 Man & G 20; Inherent in Herbert Morris 743 accepted in M & S Drapers v Reynolds [1956] 3 All ER 814 at 816; Heydon 158; Heydon *McGill* 347; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 153; Cf also Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 511.

Some basic principles for the protection of trade secrets can be deduced from the authorities, although the courts have not, up to now, taken a precise view of the allowed duration of restraints that gain their validity from such interests [61]. Trade secrets do not justify keeping a man out of his trade indefinitely [62]:

- Where trade secrets are protected the restraint may endure for as long as such information constitutes a trade secret in the hands of the covenantee [63]; this will be for as long as the knowledge remains secret, reasonably up to date and valuable.
- The trade secret may only be protected while it constitutes a useful trade secret in the covenantor's hands [64].

The notion that post-employment restraints will not be ineffective merely on the basis of duration [65] must accordingly be rejected:

- Older cases where lifelong restraints were accepted, cannot prevail [66] after *Mason* [67]. The more refined interests were not yet acknowledged in these cases. Many of these older authorities

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[61]. See e.g. Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498 at 504.

[62]. Anson 327; Heydon 161, Cf Blake 678 asserted some restraints will lose their enforceability even when the trade secret still exists but this is doubtful; Trebilcock 91-92; Cf Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160 although it was not finally decided; Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 687-688 although the issue was not finally decided.

[63]. Cf Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 385; Heydon 161; Blake 672; Trebilcock 91; Malden Timber Ltd v Leitch 1992 SLT 757 at 762; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 498, 501 and Blake 678 although they place too much emphasis on the perspective of the covenantor; See the discussion of the duration of trade secrets supra Ch 6.5.5.

[64]. Farwell 69; Heydon 161; Trebilcock 91.

[65]. Davies v Davies (1887) 36 ChD 359 at 366-367; Haynes v Doman [1899] 2 Ch 13 at 23-24; Eastes v Russ [1914] 1 Ch 468 at 482ff; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486 see counsel; Winfield (1946) 325.

[66]. Chesman v Nainby (1726) 2 Str 739; Hayward v Young (1818) 2 Chit 407; Hitchcock v Coker (1837) 6 Ad & E 438 at 454; Ward v Byrne (1839) 5 M & W 548 especially 560; Mallan v May (1843) 11 M & W 653; Nicholls v Stretton (1843) 7 Beav 42, (1847) 10 QB 346 see especially counsel 353; Hastings v Whitley (1848) 2 Exch 611; Tallis v Tallis (1853) 1 E & B 391 at 411; Mumford v Gething (1859) 7 CBNS 305 and the exchange between bench and bar 317; Giles v Hart (1859) 1 LT 154; Gravely v Barnard (1874) LR 18 Eq 518; Jacoby v Whitmore (1883) 49 LT 335; Webb v Clark (1884) 78 LT Jo 96; Davies v Davies (1887) 36 ChD 359 at 390 although the comment is made in the context of the now rejected partial general distinction; Dubowski & Sons v Goldstein [1896] 1 QB 478; Mills v Dunham [1891] 1 Ch 576 at 587; Hood and Moore's Store Ltd v Jones (1899) 81 LT 169, Haynes v Doman [1899] 2 Ch 13 at 30, Phillips v Stevens (1899) 15 TLR 325; Delius v Muller (1901) 45 Sol Jo 737; Barr v Craven (1903) 20 TLR 51; Watson v Neuffert (1863) 1 M 1110; Macintyre v MacRaild (1866) 4 M 571; Meikle v Meikle (1895) 3 SLT 204; Chapman v Swan 1912 EDL 150.

[67]. See already in Beetham v Fraser (1904) 21 TLR 8; SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 369 is over-optimistic; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 768, 771, 774; Eastes v Russ [1914] 1 Ch 468 at 476-477 and 482; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 34; See Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 810; Dickson v Jones [1939] 3 All ER 182 at 189 in combination with area; Jenkins v Reid [1948] 1 All ER 471 at 480; Electric Transmission Ltd v Dannenberg (1949) 66 RPC 183 at 192 although other aspects were more fundamental here; See Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 281; Cheshire Fifoot and Furmston 410; Trebilcock 91; See already British Workmen's & General Assurance Co Ltd v Wilkinson 1900

emphasised the general partial test that did not really allow temporal and other activity restrictions to realise their full potential [68].

- Many of the more modern cases that allowed such covenants must be condemned [69]. Customer connections and trade secrets will be protectable, and both will often be ephemeral. It is theoretically and practically likely that a restraint in an employment case may be invalid for the sole reason that it is too long in duration [70].
- In *Dempsey* [71] Gutsche J relied on *Hitchcock* [72], where it was accepted that a restraint may extend beyond the life or involvement of the covenantee in the business, as that may increase the value of the business. But this argument presupposes that there are protectable interests that will exist for the whole period, and this will seldom be the case in post-employment cases.
- It has sometimes been stated that unlimited restraints that only operate within a restricted area will be acceptable because the public will still be able to utilise the services of the covenantor outside the area [73]. But this argument over-simplifies the principles underlying the doctrine. The deprivation of the public of particular skills is not the only reason against maintaining a restraint. It will be better to stress the interests of the covenantee in determining duration.

The only worthwhile point that can be made is that the courts should probably see precise spatial restrictions as a more important source for limiting restraints than precise temporal restrictions [74].

A different picture emerges if these broad principles are applied to sale of business restraints. Goodwill will be protectable for as long as such goodwill exists. The passage of time will normally not reduce the ability of the covenantor to interfere with goodwill [75]. A wide approach - though

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SLT 67 at 68 although the restraint was also too wide on other grounds; Pratt v Maclean 1927 SN 161; Cramond (Cash Register Terminals) Ltd v Reynolds 1988 GWD 8-310 was critical of unlimited restraint; Fraser 92 was critical of Stalker v Carmichael 1735 M 9455; A similar caveat is also voiced by Walker 185 although the point here is made with regard to area and duration; Lewin v Sanders 1937 SR 147 at 152; Pieterse v Cilliers 1945 (2) PH A.31 53 at 54; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348 although the issue was not finally decided 354.

68. See e.g. Christie *Jur Rev* 292 with reference to Hinde v Gray (1840) 1 Scott NR 123; Nordenfelt 666.

69. Fitch v Dewes [1921] 2 AC 158 especially from 163, Cf Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348; Gilford Motor Co Ltd v Horne [1933] Ch 935, Distinguished M & S Drapers v Reynolds [1956] 3 All ER 814 at 817, Cf the critical approach of the court a quo 949; Anson 327; Cheshire Fifoot and Furmston 410 although the author was also more cautious; Cf Taylor v Campbell 1926 SLT 260 at 262 must also be approached with caution.

70. See supra.

71. Dempsey v Shambo 1936 EDL 330 at 337 see also the argument 338.

72. Hitchcock v Coker (1837) 6 Ad & E 438 at 455 (wrongly cited in the case).

73. Hood and Moore's Store Ltd v Jones (1899) 81 LT 169; Haynes v Doman [1899] 2 Ch 13 18; Fraser 91; Dempsey v Shambo 1936 EDL 330 at 338 relying on Edgcombe v Hodgson (1902) 19 SC 224 at 226.

74. Cf however Heydon 158 ibid.

75. See Elves v Crofts (1850) 10 CB 241 at 259 although the explanation should not apply in employment cases.

too much cannot be read into it today - was already followed in the 19th century [76] and the same approach is correctly continued up to the present [77].

The goodwill will probably only be eliminated if the business to which it relates is discontinued for a sufficiently long period. Yet in England and Scotland a restraint will seldom, if ever, be reduced on this ground as reasonableness must be determined from the moment of conclusion of the contract [78]. There will be very few occasions where it will be foreseeable that the goodwill will not exist for the life of the seller. Unlimited restraints will probably be allowed even where a restraint is laid down by NHS practitioners who cannot transfer goodwill. The goodwill in these cases can still be continued through partnership [79]. In South Africa the court might have a clearer idea of the status of the goodwill at the time when the restraint comes to court [80]. However, the South African and Anglo-Scottish points at which reasonableness should be determined in sale of business cases will often not be far removed from one another.

Some authorities have not properly considered the almost absolute justificatory function of goodwill when it comes to duration. The discussion of this issue by Heydon [81] is founded on the misconception that protection in the case of sale of business restraints is also based on customer connections. His appeal for a stricter approach towards time restrictions in these cases is therefore misplaced. Time restrictions will probably only have a broad attitudinal impact in most of these

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[76]. Williams v Williams (1818) Swan 253; Archer v Marsh (1837) 6 Ad & El 959; Wallis v Day (1837) 2 M & W 273; Pemberton v Vaughan (1847) 10 QB 87; Price v Green (1847) 16 M & W 346; Elves v Crofts (1850) 10 CB 241; Atkyns v Kinnier (1850) 4 Exch 776 (although this was a partnership case); Turner v Evans (1852) 2 De GM & G 740; Avery v Langford (1854) 1 Kay 663; Harms v Parsons (1862) 32 Beav 328; Brampton v Beddoes (1863) 13 CBNS 538; Bird v Lake (1863) 1 Hem & M 338; Dales v Weaber (1870) 18 WR 993; Wolmerhausen v O'Connor (1877) 36 LT 921; George Hill and Co Ltd v Hill (1886) 3 TLR 144 at 145; Nordenfelt; Stride v Martin (1897) 77 LT 600; Marshalls Ltd v Leek (1900) 17 TLR 26; Dunman v Trautman (1891) 9 SC 24; Coetzee v Eloff 1923 EDL 113.

[77]. Connors Brothers Ltd v Connors [1940] 4 All ER 179 at 195; Whitehill v Bradford [1952] Ch 236 at 251-252; Trebilcock 241-242; Estate Fisher v Bradley 1931 CPD 46 at 48; Wilkinson v Wiggill 1939 NPD 4 at 12; Forman v Barnett 1941 WLD 54 at 64; Vermeulen v Smit 1946 TPD 219 at 221-222; Katz v Efthimiou 1948 (4) SA 603 (O) 613; Weinberg v Mervis 1953 (3) SA 863 (C) 870-871; Kin v Sharneck 1959 (3) SA 534 (E) 536; Schwartz v Subel 1948 (2) SA 983 (T) 989; Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280-281; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 109; Wohlman v Buron 1970 (2) SA 760 (C) 763; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 237 but see the reservations infra; Christie 448.

[78]. Elves v Crofts (1850) 10 CB 241 at 259-260; Robertson v English (1867) 4 WW & AB 238; Jacoby v Whitmore (1883) 49 LT 335 at 337; Townsend v Jarman [1900] 2 Ch 698 at 703; Gooderson 423 did not take proper notice of this factor; Cf the criticism of Heydon 133-134 although the principle can be justified on other grounds; See infra Ch 13.

[79]. Whitehill v Bradford [1952] Ch 236 at 253-254.

[80]. PJ Visser (1985) 17 *De Jure* 194 at 197 see the example mentioned here, See Kerr *Tribute* 189.

[81]. Heydon 198; Pellow v Ivey (1933) 49 TLR 422 at 423; Atiyah 340; Randev v Pattar 1985 SLT 270, See also McBryde 601; Durban Rickshas Ltd v Ball 1933 NPD 479 at 497; Weinberg v Mervis 1953 (3) SA 863 (C) 871 investigated the relationship between doctor and customer for this purpose.

cases [82]. Although it was intended more generally, the statement in *Bridge* [83] to the effect that "there appears to be no reported case where a restriction which was otherwise reasonable has been held to be unreasonable solely because of its duration" should only apply to sale of business restraints [84].

Since early on the courts have considered that a restraint may transcend the covenantee's actual holding of the interest [85]. The reason, translated into modern parlance, is that protectable interests may be valuable beyond the covenantee's holding of it. They will often be transferred to a successor, and the mere transfer does not affect the protectability of the interest; in fact it will increase the value of the business when it is transferred [86]. The only real problems that will exist in these cases will be to determine whether the rights in terms of the restraint have been transferred.

Finally, a restraint will be unacceptable if it might be extended to a period that will be too long in England and Scotland [87]. In South Africa the law is more problematic. It might be argued there that the restraint should still be regarded as reasonable if the discretion has actually been reasonably exercised when the court is asked to enforce it. But the courts will probably not accept this view.

5. Activity limitations

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82. Katz v Efthimiou 1948 (4) SA 603 (O) 613; Weinberg v Mervis 1953 (3) SA 863 (C) 871.

83. Bridge v Deacons [1984] AC 705 717, Chitty 1197.

84. Connors Bros Ltd v Connors [1940] 4 All ER 179 at 195, See Chitty 1214, Heydon 198 although his criticism cannot be accepted see supra; Lindley 10-182 with reference to Pandit v Shah mentioned in Lindley; Probably Cameron v Mathieson 1994 GWD 29-1740; Vermeulen v Smit 1946 TPD 219 at 222; Katz v Efthimiou 1948 (4) SA 603 (O) 613; Weinberg v Mervis 1953 (3) SA 863 (C) 870-871; Kin v Sharneck 1959 (3) SA 534 (E) 536; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 237; Cf Dempsey v Shambo 1936 EDL 330 at 337, 338 with regard to a restraint in a lease of a business and goodwill.

85. Contra Horner v Graves (1831) 7 Bing 735 at 744; Hitchcock v Coker (1837) 6 Ad & E 438 at 455-456; Pemberton v Vaughan (1847) 10 QB 87; Hastings v Whitley (1848) 2 Exch 611; Atkyns v Kinnier (1850) 4 Exch 776 at 783; Smith v Hawthorn (1879) 76 LT 716; Eastes v Russ [1914] 1 Ch 468 at 483; Fitch v Dewes [1921] 2 AC 158 at 168; Kales 195-195, 204; Rodger v Herbertson 1909 SC 256 at 261 where effectiveness was not even discussed; Fraser 92; Estate Matthews v Redelinghuys 1927 WLD 307 at 314; Thompson v Nortier 1931 OPD 147 at 153-154 misused this principle, See the distinction between old and new customers made by Kerr 511 is unhelpful.

86. Hitchcock v Coker (1837) 6 Ad & E 438 at 455-456; Atkyns v Kinnier (1850) 4 Exch 776 at 783; Townsend v Jarman [1900] 2 Ch 698 at 703; Jacoby v Whitmore (1883) 49 LT 335; Fitch v Dewes [1921] 2 AC 158 at 168; See Elves v Crofts (1850) 10 CB 241 at 259-260 and the role of this on English principles for the time of the determination of reasonableness.

87. Heydon *McGill* 346; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 453 accepted that the words "at least" in this case would not be effective but it was stated that it would not affect the rest of the clause, See Dumbarton Steamship Co Ltd v MacFarlane (1899) 1 F 993 where it was not discussed.

The courts will also look at the activities that are restricted. The activities of the covenantor, apart from their temporo-spatial dimension, may be no further restricted than is necessary for the reasonable protection of the legitimate interests of the covenantee. Some authorities have stressed time and space restriction almost to the exclusion of this aspect [88]. However, activity restrictions will often be most effective in ensuring the validity of a restriction [89]. Thus a restraint not to do any business within a certain area for a certain time, however limited, will be impossible to justify [90].

The different activities that may be limited by the restraint will depend on the facts of the case and the extent to which other limiting techniques are used. The permutations are theoretically endless. Restraints have taken on wide ranging and sometimes esoteric forms. Only some of the most important activity restrictions will be analysed.

5.1. As principal or as employee [91]

It might be difficult to determine whether a person is restricted as employee and/or as principal [92]. The question may be important in establishing the scope of protection, but will also be fundamental to the determination of reasonableness.

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[88]. Putsman v Taylor [1927] 1 KB 637 at 642; Blake 675; Cheshire Fifoot and Furmston 409; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 614; Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W) 858 although activity restraints played an important role in argument; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503.

[89]. Although it was called by different names: Herbert Morris 715 "subject matter"; Anson 326, Treitel 408, Trebilcock 90 and 103 "scope"; Heydon 121 "the trade controlled by the covenant"; Gloag 569-570 "must refer to a particular trade or profession"; Walker 186 "the extent of restriction"; Weinberg v Mervis 1953 (3) SA 863 (C) 867 "scope of activities"; Christie 441 "nature".

[90]. Mitchel v Reynolds (1711) 1 PWms 181 at 187; Ward v Byrne (1839) 5 M & W 548 at 559; See also Vernon v Hallam (1886) 34 ChD 748; Baker v Hedgecock (1888) 39 ChD 520 at 522; Mills v Dunham [1891] 1 Ch 576 at 580-581, 586-587, 588, 589-590; See Perls v Saalfeld [1892] 2 Ch 149; Woods v Thornburn (1897) 41 Sol Jo 756 and Ehrman v Bartholomew [1898] 1 Ch 671; Hood & Moore's Store Ltd v Jones (1899) 81 LT 169; Anson 326; Morris & Co v Ryle (1910) 26 TLR 678; Cf Christie *Jur Rev* 300 who still discussed this issue in terms of the partial general distinction; Heydon 137; Lindley 10-179; Watson v Neuffert (1863) 1 M 1110 at 1112-1113; Mulvein v Murray 1908 SC 528 at 531, 534 but see the more restricted interpretation 532; See Kennedy v Clark (1917) 33 ShCt Rep 136 the court seems to accept this; Gloag 569-570; Walker 186; Empire Theatres Co Ltd v Lamor 1910 WLD 289 at 291-292.

[91]. See also restraints against working for clients they have not really been discussed in the courts: Ixora Trading Inc v Jones [1990] FSR 251, Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69.

[92]. See e.g.: Ward v Byrne (1839) 5 M & W 548 at 551-555; Rolfe v Rolfe (1846) 15 Sim 88 at 90; George Hill and Co Ltd v Hill (1886) 3 TLR 144 at 145; Cade v Calfe (1906) 22 TLR 243; Cavendish v Tarry (1909) 52 Sol Jo 726; Ramoneur Co Ltd v Brixey (1911) 104 LT 809; W Williams v Fairbairn (1899) 1 F 944; Taylor v Campbell 1926 SLT 260 at 261; WAC Ltd v Whillock 1990 SLT 213, See McBryde 600, 606, Lewis v Miller 1994 GWD 23-1388; Stirling Park & Co v Miller (unrep); Scheckter v Kolbe 1955 (3) SA 109 (G) 110-113, See Heydon 293; Cf Phillips v Stevens (1899) 15 TLR 325 at 326 and the partial general restraint distinction.

A restraint against employment would have to be limited at least to competitors. These restrictions will always be too wide if they are not limited to the competitors or potential competitors of the covenantee [93]. Yet the matter does not end there [94]. Only such employment with competitors as will interfere with legitimate interests may be protected, and here restraints for the protection of the different types of legitimate interests will part ways.

Employment will have to be restricted to employers who interfere with true customer connections [95]. Only employment activities that will interfere with such connections may be prohibited [96]. It was accepted in *Marion White* [97], a hairdresser case, that work as a receptionist for another hairdresser after termination of employment would also interfere with customer connections of the previous employer, but work as a bookkeeper would not. The restraint was interpreted as relating only to the prohibition of active participation in the hairdressing business.

The covenantor cannot be prohibited from working for persons who do not compete in the field where the protectable trade secret exists [98] and is useful [99], even if the potential new employer is a competitor in other fields of activity. The covenantor may only be restricted from being employed in a capacity where trade secrets can be divulged or used. The employment will have to be limited along very similar lines to restraints for protection of customer connections if protection is merely sought against possible use [100], although it has not been properly distinguished from the problem

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93. White Tomkins and Courage v Wilson (1907) 23 TLR 469; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 395 although it was not area in the traditional sense that was relevant here; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 571 and see the discussion between bench and bar 569; Routh v Jones [1947] 1 All ER 179 at 182 and Routh v Jones [1947] 1 All ER 758 at 762; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 240; JA Mont (UK) Ltd v Mills [1993] FSR 577 at 581-582; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 334, But cf 332 is confusing; See Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 360-363; See Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 572 and the scepticism of "indirect competition"; See also the discussion of trade secrets infra.

94. Cf Francis Delzenne Ltd v Klee (1968) 112 Sol Jo 583 although no reasons were given for it in the report.

95. Davies Turner & Co v Lowen (1891) 64 LT 655 at 656 will not be acceptable today; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 332 but see the criticism infra Ch 5.4; Cf Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 444-446 did not properly relate the techniques used to the interests that could be protected.

96. See e.g. Mason, Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227.

97. Marion White Ltd v Francis [1972] 3 All ER 857 at 863.

98. Vandervell Products Ltd v MacLeod [1957] RPC 185 at 192-194, 194-195, 196-197; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 especially 645-646, See the criticism Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1480-1482, 1489; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 343; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1482-1483, 1489; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 426-427, 433, 435; A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299 is unacceptable on this point.

99. Cf the argument of counsel Malden Timber Ltd v McLeish 1992 SLT 727 although the court was sceptical of this interpretation 733.

100. JA Mont (UK) Ltd v Mills [1993] FSR 577 at 590.

of disclosure [101]. However, a restraint against being employed will be particularly apt in cases where fear of disclosure of a trade secret to a competitor is the main problem [102]. A restriction may include a wide range of operations here. A trade secret can be divulged even if a person is employed by his new employer to perform different functions from those that strictly concern the trade secrets. In these cases it will often be enough, for the purpose of the activity restraint, to restrict the covenantor from working for competitors [103]. But this principle should perhaps also not be absolute. There is no real authority for the notion that these restraints will have to be limited to specific types of employment [104]. Yet it is suggested that such wide restraints should be allowed only if there is a reasonable chance that the secrets may still flow from one part of a competing business to the other.

In sale of business cases the goodwill sold can also be protected by clauses against being employed. However, the covenantee may only protect himself against the covenantor working for competitors of the business sold, and not competitors of other businesses owned by him [105]. Moreover, the activities of the covenantor will have to be further restricted to ensure that they will not interfere with goodwill or trade secrets if performed in the service of a competitor [106]. The courts have not really taken up this issue, but it is suggested that there might be cases where prohibition against employment in an established business of a competitor will have little or no effect on the goodwill of the covenantee. It might be that the courts will in future be more critical of such restraints.

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[101]. JA Mont (UK) Ltd v Mills [1993] FSR 577 at 590; See failure to draw the distinction: Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 395, Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1479.

[102]. MacQueen *Stair Encyclopaedia* 1468.

[103]. See British Mannesmann Tube Co Ltd v Phillips (1903) 48 Sol Jo 117 where these arguments already played an important role; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 395; Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 448; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 240; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1479; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 22, 28-29, But see the narrow view 24-25, Cf the criticism of Forte 22; See SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36-37 see also the remarks made with regard to the granting of interdict 37; It is only on this basis that A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299 can be explained; See Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 72-73 although different issues came into play here see infra; Cf Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40 did not properly investigate it; Scott Robinson 159; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 363.

[104]. E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 314 although the case concerned the protection of information; Left open in Commercial Products Ltd v Vincent [1965] 1 QB 623 at 646; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 343 but the argument here was narrowly related to the fact that the restraint was not limited to competitors that could use the trade secret, See Heydon 142; JA Mont (UK) Ltd v Mills [1993] FSR 577 at 581 and the arguments of counsel apparently accepted by the court.

[105]. British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 574-575 not following Smedley Ltd v Smedley (1918) unreported; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 269.

[106]. See D Bates & Co v Dale [1937] 3 All ER 650 counsel for the covenantor 651 the argument apparently found some favour with the court 655.

5.2. Restraint not to compete or interfere with the business of the covenantee

These types of restraints have met with a mixed fate in post-employment cases [107]. It must be possible to determine the limits of the business of the covenantee that may not be competed or interfered with, and such restraints in post-employment cases have on occasion been described as too vague. It will often be very difficult for the covenantor to determine what he is obliged not to do [108].

Moreover, there will be difficulties with the reasonableness of such clauses. The reasonably protectable interests of the covenantee should still occasionally justify such wide protection, for instance, in the case of a trade secret that permeates the whole business of the covenantee [109], but it will have to be approached with caution. Reasonably protectable interests will seldom be broad enough to justify such wide activity restrictions. The courts have mostly accepted such clauses after narrowing down their field of operation through contextual interpretation [110]. In *Group 4* [111] the restraint was aimed at protecting trade secrets and restricted the covenantor from being concerned in a competing business. The court referred to the trade secret cases where it was accepted that a person could be restricted from being employed in any position with a competitor [112]. However, those cases are unhelpful in this context. It should have been asked whether the restraint would go further than restricting the covenantor from competing in the sphere where the trade secrets would be relevant. It might be that the trade secrets here would have been valuable to all competitors, but there are some indications from the case that this was not so.

In sale of business cases, restraints against competition will generally be regarded as acceptable [113]. Here goodwill is protectable, and it will often justify such wide restraints. The restraint will

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[107]. See Reeve v Marsh (1906) 23 TLR 24 although the issue was not finally decided on this basis; Cf also Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 where it was common cause that a restraint against entering into "conflicted" activities was too wide; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 572.

[108]. Beetham v Fraser (1904) 21 TLR 8; Express Dairy Co Ltd v Jackson (1930) 46 TLR 147; See the difficulties in Vandervell Products Ltd v McLeod [1957] RPC 185 at 197; British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68 although the court thought that the restraint could be more narrowly interpreted; Contra Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 73 however it did not really discuss it.

[109]. Cf the facts of Caribonum Co Ltd v Le Couch (1913) 109 LT 385 where the restraint was invalid for other reasons.

[110]. Beetham v Fraser (1904) 21 TLR 8 although the interpretation of Heydon 140 is not justified by the case; Barr v Craven (1903) 20 TLR 51, See Heydon 128; Reeve v Marsh (1906) 23 TLR 24, See Christie *Encyclopaedia* 604; British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68.

[111]. Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 72-73.

[112]. See supra 5.1.

[113]. Marshalls Ltd v Leek (1900) 17 TLR 26; See Castelli v Middleton (1901) 17 TLR 373 although the clause itself was not so phrased; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 especially at 271; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; McBryde 601; Cf Brooks and Wynberg v New United Yeast Distributors 1936 TPD 296 at 305 where the court accepted that such a restraint in a combination case was not too

however still have to be limited to the protection of goodwill sold. Heydon [114] accepts that a seller cannot be restricted from being involved in any business for the time being carried on by the buyer as not all future activities are protectable, and this view seems theoretically justifiable. It was subjected to some unwarranted criticism in *Commercial and Industrial Holdings* [115], but the court in the end interpreted the restraint in compliance with the principle as expressed by Heydon.

5.3. Activity restrictions based on activities previously performed by the business which the employee worked for or activities performed by the business sold

The activity restriction will sometimes be based on certain or all of the activities of the business for which the employee worked, or certain or all of the activities of the business sold [116]. A restraint will often be ineffective for being wider than the protection of any interest of the covenantee if it restricts wider activities than those exercised by the business of the employer, in post-employment cases, or the business sold, in sale of business restraints [117]. This is not an immutable principle. There will be some exceptions [118]. In all cases the scope of restraints will depend on the type of business and the type of relationship of which it forms a part. Yet parties will have to think very carefully about restraints that go beyond the activities of the covenantee.

The sphere of business is more important than the actual business carried on. In a sale of business restraint the sphere of business can be defined as "floor covering" where a carpet manufacturer only makes certain types of carpets but where the business will compete with other types of manufacture of floor covering [119]. However, this has sometimes been exaggerated [120]. The activity restraint here comes very close to being too wide.

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vague; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) especially 239; Cf Amalgamated Retail Ltd v Spark 1991 (2) SA 143 (SEC) 148-150 although it concerned franchise.

114. Heydon 239.

115. Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 239

116. On how a restraint not to practise similar business should be interpreted see: Heydon 293 with reference to Automobile Carriage Builders Ltd v Sayers (1909) 101 LT 419, Christie 446 with reference to Capnorizas v Webber Road Mansions (Pty) Ltd 1967 (2) SA 425 (A).

117. Avery v Langford (1854) 1 Kay 663 at 665 but see the interpretation; Rogers v Maddocks [1892] 3 Ch 346 at 358-359; Hooper & Ashby v Willis (1905) 21 TLR 691 at 692; See Morris & Co v Ryle (1910) 103 LT 545; Goldsoll v Goldman [1915] 1 Ch 292 at 297-298, 299, 300-301; SV Nevanas & Co v Walker & Foreman [1914] 1 Ch 413 at 424-425; Whitmore v King (1918) 87 LJCh 647; Heydon 138; Cowan v Pomeroy 1952 (3) SA 645 (C) 651-652; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 239-240 but see the limitation by interpretation.

118. See e.g. Heydon 142.

119. Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 106ff.

120. Ropeways Ltd v Hoyle (1919) 120 LT 538 at 541-542; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 80.

Where the protected business is a medical practice or legal firm the restraint will have to be limited to practising as a doctor or lawyer . A narrow view has been taken of the types of medical practice that will harm the covenantee if practised by the covenantor after termination of his association with the covenantee [121]. Wider restraints on lawyers have been allowed [122], but greater specificity might be required today [123].

Many other types of limitations have also become common. The covenantor cannot be restricted from any business connected to the wood business where the covenantee bought and sold timber from certain sources [124]. The courts have recognised the distinction between wholesale and retail [125], although it cannot be clearly drawn in all types of business [126]. It has been recognised that there is a distinction between selling and manufacturing [127], although the spheres of business will again overlap in certain types of businesses [128].

5.3.1. Restraints based on activities of the employer in post-employment restraints

In earlier cases courts often did not discuss the issue whether such clauses were acceptable and short shrift was even made of suggestions that clauses could not be so phrased [129]. However, such cases will have to be approached with caution in modern restraint of trade law.

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121. Routh v Jones [1947] 1 All ER 179 at 182 and especially 183, On Appeal Routh v Jones [1947] 1 All ER 758 see the more careful approach 761-762; Jenkins v Reid [1948] 1 All ER 471 at 481; Whitehill v Bradford [1952] Ch 236 especially 248-249; See MacFarlane v Kent [1965] 2 All ER 376 at 381, See the criticism Peyton infra 1224-1225; Lyne-Pirkis v Jones [1969] 1 WLR 1293 1301 and 1299; Peyton v Mindham [1971] 3 All ER 1215 especially 1222ff; Clarke v Newland [1991] 1 All ER 397 at 401ff and 405 the court used limitative interpretation; Heydon 138 and Heydon *McGill* 345; See the precise restriction in Anthony v Rennie 1981 SLT (Notes) 11; McBryde 600; Estate Matthews v Redelinghuys 1927 WLD 307, Lewin v Sanders 1937 SR 147 at 151 cannot be accepted today; See Weinberg v Mervis 1953 (3) SA 863 (C) 866-867 the court must not become too strict; Rogaly v Weingartz 1954 (3) SA 791 (D); Hermer v Fisher 1960 (2) SA 650 (T) 656; Steyn v Malherbe 1967 (2) PH A.43 150 at 151 where this was not discussed; See Malan v Van Jaarsveld 1972 (2) SA 243 (C) 252-253 and the narrowing down by interpretation.

122. Bridge v Deacons [1984] AC 705; Gordon v Van Blerk 1927 TPD 770.

123. Fellowes & Son v Fisher [1976] QB 122 at 129, 142; Dallas McMillan v Simpson 1989 SLT 454 at 456; Walker 186.

124. Whitmore v King (1919) 119 LT 533.

125. Cf Moenich v Fenestre (1892) 67 LT 602; Cowan v Pomeroy 1952 (3) SA 645 (C) 650-651.

126. Rogers v Maddocks [1892] 3 Ch 346 at 354-355, 357, 358, See Heydon 139.

127. Josselyn v Parson (1872) LR 7 Exch 127 especially 129; Cf also Lovell & Christmas Ltd v Wall (1911) 27 TLR 236; Heydon 296; See Brooks and Wynberg v New United Yeast Distributors (Pty) Ltd 1936 TPD 296 at 305 with reference to British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 334.

128. Harms v Parsons (1862) 32 Beav 328 at 331-332; Cf Castelli v Middleton (1901) 17 TLR 373 will probably today be too wide.

129. Nicoll v Beere (1885) 53 LT 659; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447; Moenich v Fenestre (1892) 67 LT 602; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 306-307, But see the narrower view of the minority 314; Cf Ward v Byrne (1839) 5 M & W 548 at 560 where there was uneasiness with such a clause.

Restraints will today often have to be much narrower because the covenantee cannot protect his business as a whole; he can merely protect legitimate interests [130]. The covenantor-related requirements will, in many cases, call for narrower delineation of activities [131]. Such wide restraints will only be acceptable if certain very specific requirements are met.

- The activities carried on by the employer may be used as a basis for the protection of customer connections if all the activities so carried on will interfere with them when executed by the employee after termination of employment [132]. This will be the case with a small business where all types of activities were carried on by the covenantor and where all or the vast majority of activities are related generally to the customers of the business.
- The trade secret must be of such a nature that any activity performed by the business will, if performed by the covenantor, jeopardise that trade secret [133]. The chances of success for these activity restraints will be greater in trade secret cases than in customer connection cases. Trade secrets often pervade the activities of a business to a much greater extent [134]. Not only restriction of activities carried on by the business that would allow use of the trade secret, but also prohibition of activities that would cause a risk of disclosure to the detriment of the employer, should be allowed. Yet, there will be cases where not all activities carried on by the employer will have this effect [135].

Heydon [136], in his discussion of restraints for the protection of customer connections states that:

> "a covenant which restrains the employee from carrying on the employer's business, but which extends further than the job in which the employee was in fact engaged is too wide ... ".

It will be more conducive to the validity of a restraint - especially in the case of customer connection restraints - if the activity elements of that restraint are based on the activities, or some

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130. Cf Clark v Electronic Applications (Commercial) Ltd [1963] RPC 234 at 238 where interests were not properly evaluated.

131. See Great Western & Metropolitan Dairies Ltd v Gibbs (1918) 34 TLR 344 accepted that the form used here would be more apt in a sale of goodwill case although this point was not clearly made; Attwood v Lamont [1920] 3 KB 571 at 579-580, 593, See Christie 442; Bowler v Lovegrove [1921] 1 Ch 642 at 654 and see infra; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 281 and the concession of counsel; Rentokil Ltd v Hampton 1982 SLT 422, See Woolman 255; See Aling and Streak v Olivier 1949 (1) SA 215 (T) 223 although the reasonableness of that part was not more widely discussed; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) common cause between the parties; The Concept Factory v Heyl 1994 (2) SA 105 (T) 111, 114.

132. Heydon 140 relying on Beetham v Fraser (1904) 21 TLR 8 but the case does not support him.

133. See Caribonum Co Ltd v Le Couch (1913) 109 LT 385 at 388 apparently did not have problems with this aspect.

134. See Continental Tyre and Rubber (Great Britain) Co Ltd v Heath (1913) 29 TLR 308 at 310 although knowledge and not trade secrets was stressed, Cf Heydon 140; Inherent in Rentokil Ltd v Hampton 1982 SLT 422.

135. Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 689 although it is not clear.

136. Heydon 139.

of the activities, performed by the employee within the business [137]. But this can be no more than a rule of thumb. Depending on the facts, only narrower restraints will sometimes be allowed while wider restraints may sometimes be effective.

5.3.2. Restraints based on the activities of the covenantee in sale of goodwill restraints

In sale of business cases it will generally be sufficient, for the purpose of activity restriction, to base the covenant on the activities performed in the business sold. In *Weinberg* [138] it was accepted that restriction may take place "with regard to activities normally falling within the confines of the type of business bought by the purchaser". Restraints based on these activities are common practice in sale of business cases [139]. The mere fact that the covenantor did not perform all these activities will not be relevant [140]. It might be suggested that the covenantor may only be restricted from performing those activities of the business sold that pertained to goodwill or trade secrets. However, restriction of activities that were performed by the business sold will generally be allowed, even if all such activities are not interest-related, because it will seldom be practicable to formulate a narrower restraint that will still provide proper protection [141]. Even mundane administrative tasks will not generally be performed in isolation. Nonetheless, it is conceivable that there might be some clearly separable activities that will not impact on legitimate interests, and in such cases the restraints cannot merely be based on the activities of the business sold.

5.4. Non-dealing and non-solicitation of customer restraints

The term "non-solicitation" is sometimes used in the pregnant sense to include non-dealing [142], but here the former will be separated from the latter. The effect of non-solicitation and non-dealing restraints do not differ much, but there are two points of separation [143]:

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137. See already Morse v Fowler (1899) 44 Sol Jo 89; Attwood v Lamont [1920] 3 KB 571 at 592-593; Heydon 139-140.

138. Weinberg v Mervis 1953 3 SA 863 (C) 868, See Kerr 509.

139. Williams v Williams (1818)) 2 Swan 253 and along similar lines Leighton v Wales (1838) 3 M & W 545; Elves v Crofts (1850) 10 CB 241; Tallis v Tallis (1853) 1 E & B 391; Harms v Parsons (1862) 32 Beav 328; Brampton v Beddoes (1863) 13 CBNS 538; Hagg v Darley (1878) 47 LJCh 567; Stride v Martin (1897) 77 LT 600; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563; Connors Bros Ltd v Connors [1940] 4 All ER 179 and see infra; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60; Dumbarton Steamboat Co Ltd v MacFarlane (1899) 1 F 993; Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W); Pito v Deeb 1967 (1) SA 166 (O).

140. See Heydon 192 with reference to Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 269 and the notion that a person who was a partner could also be restricted as employee; Weinberg v Mervis 1953 (3) SA 863 (C) 867-868, See Kerr 509.

141. See the related argument of Heydon 192.

142. Business Seating Ltd v Broad [1989] ICR 729 at 733; Heydon 144ff; Chitty 1206.

143. Spowart Taylor & Hough 750 on a further public interest distinction.

- In non-solicitation cases the covenantor may still do business with the customers of the covenantee in the field in which he was employed by the covenantor, but he may only deal with customers who come to him out of their own accord; he may not attempt to convince them to change allegiance [144]. The impact of non-dealing restraints will be wider. Business with a customer is prohibited even if that customer comes to the covenantor spontaneously [145]. Non-solicitation restraints will gain wider acceptance than non-dealing restrictions because they will have a more limited impact on the freedom of work of the covenantor [146].
- Where only trade secrets in the form of information about the identity of customers are in issue, non-dealing, as opposed to non-solicitation, restraints might sometimes be problematic because no abuse of trade secrets will take place if customers come to deal with the covenantor out of their own volition. Wider restraints will probably only be allowed if it will be difficult to police solicitation. Nevertheless, this issue will seldom be of importance as limitations that go beyond solicitation and dealing with customers will often be allowed in these cases [147].

Non-solicitation and non-dealing restraints deserve separate attention because of one important and peculiar feature which they frequently display. Non-dealing [148], non-solicitation [149] and non-

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[144]. For the interpretation of the word solicit: Cullard v Taylor (1887) 3 TLR 698; Horton v Mead [1913] 1 KB 154; Reeve v Marsh (1906) 23 TLR 24; Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 58-59, Tolgate Holdings Ltd v Olds 1968 (2) PH A.78 (W); Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 350; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 307, 308; Simaan v SA Pharmacy Board 1982 (4) SA 62 (A) especially 76; Sellers v Eliovson 1985 (1) SA 263 (W) 265-266, Discussed Christie 446 and Kerr 521.

[145]. Oswald Hickson Collier & Co v Carter-Ruck [1984] AC 720 at 723; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; Morris Angel & Son Ltd v Hollande [1993] ICR 71 at 75; Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 59.

[146]. Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1235; Cf Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248 with reference to Mulvein v Murray 1908 SC 528 although it was exaggerated here.

[147]. Supra especially 5.2 and infra 5.5; Cf SW Strange Ltd v Mann [1965] 1 WLR 629 at 642 where non-solicitation was stressed.

[148]. Nicholls v Stretton (1847) 10 QB 346, (1843) 7 Beav 42; May v O'Neil (1875) 44 LJCh 660; Mills v Dunham [1891] 1 Ch 576; Baines v Geary (1887) 35 ChD 154; Lewis & Lewis v Durnford (1907) 24 TLR 64; Jenkins v Reid [1948] 1 All ER 471; Financial Collection Agencies (UK) Ltd v Batey (1973) 117 Sol Jo 416; MacFarlane v Kent [1965] 2 All ER 376; Edwards v Worboys [1984] AC 724; Bridge v Deacons [1984] AC 705, See Dallas McMillan v Simpson 1989 SLT 454 at 456 although it is too strict; Macintyre v MacRaild (1866) 4 M 571; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 453; Scottish Agricultural Industries plc v Richard 1990 GWD 13-640; Hall Advertising Ltd v Woodward 1992 GWD 26-1688; Vermeulen v Smit 1946 TPD 219; Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W).

[149]. Ward v Byrne (1839) 5 M & W 548; Batho v Tunks [1892] WN 101; Gophir Diamond Co v Wood [1902] 1 Ch 950; Reeve v Marsh (1906) 23 TLR 24; Morris & Co v Ryle (1910) 26 TLR 678; Pearks Ltd v Cullen (1912) 28 TLR 371; East Essex Farmers Ltd v Holder [1926] WN 230; Dickson v Jones [1939] 3 All ER 182; M & S Drapers (a firm) v Reynolds [1956] 3 All ER 814; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10; Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498; Spafax (1965) Ltd v Dommett (1972) 116 Sol Jo 711; Financial Collection Agencies (UK) Ltd v Batey (1973) 117 Sol Jo 416; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401; Kerr v Morris [1987] Ch 90 at 101; Allied Dunbar (Frank Weisinger) Ltd v Weisinger

interference [150] restraints are frequently limited to all or certain identified or identifiable customers of the covenantee. In fact, non-dealing and non-solicitation covenants are often combined for this purpose [151]. Such restraints will have to be so limited that only dealings with customers who may be reasonably protected are included [152].

It has been stated that it will not be necessary to inquire into the geographical width of such restraints [153]. That does not mean that there will be no spatial restraint here. Incidental to the activity restraint will be a spatial delimitation that is so specific that it will often not be necessary to consider separately whether it is related to an area within which interests can be reasonably protected [154]. Moreover, many of the factors that are normally important when determining the spatial reasonableness of a restraint will not be relevant here. Restriction will not be over an entire geographical area but will be limited to certain customers who may be scattered to such an extent that it will allow the covenantor still to work in the lacunae [155]. However, although their role will be much reduced, further spatial restraints may still be relevant.

[1988] IRLR 60; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483; Business Seating (Renovations) Ltd v Broad [1989] ICR 729; Bristol Clothing and Supply Co (Glasgow) Ltd v Dickie (1933) 49 ShCt 70; Allen & Leslie (International) Ltd v Wagley 1976 SLT ShCt 12; Steiner v Breslin 1979 SLT (Notes) 34 at 35; Rentokil Ltd v Hampton 1982 SLT 422; A & D Bedrooms Ltd v Michael 1984 SLT 297 see the discussion 298; Rentokil Ltd v Kramer 1986 SLT 114; Donald Storrie Estate Agents v Adams 1989 SLT 305; Malden Timber Ltd v Leitch 1992 SLT 757; Although it is not clear from the report what the restraint entailed see the interdicts in Hutchison & Craft v Burns 1994 GWD 26-1547; Scotcoast Ltd v Halliday 1995 GWD 7-355; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) although it is not clear; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC); Sellers v Eliovson 1985 (1) SA 263 (W); Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C).

150. Great Western & Metropolitan Dairies Ltd v Gibbs (1918) 34 TLR 344.

151. Rannie v Irvine (1844) 7 Man & G 969; Mills v Dunham [1891] 1 Ch 576; Dubowski & Sons v Goldstein [1896] 1 QB 478; Konski v Peet [1915] 1 Ch 530; Gilford Motor Co Ltd v Horne [1933] Ch 935; Rayner v Pegler [1964] EG 301, 967; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227; Marion White Ltd v Francis [1972] 3 All ER 857; T Lucas and Co Ltd v Mitchell .[1974] Ch 129; Stenhouse Australia Ltd v Phillips [1974] AC 391; Dairy Crest Ltd v Pigott [1989] ICR 92; John Michael Design plc v Cooke [1987] 2 All ER 332; Austin Knight (UK) Ltd v Hinds [1994] FSR 52 see especially 58; Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354; Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868; Douglas Llambias Associates Ltd v Napier 1990 GWD 39-2243; Snap-on-tools Ltd v McCluskey 1991 GWD 7-367; Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69; NCH (UK) Ltd v Mair 1994 GWD 34-1986; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T); Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C); Aetiology Today CC t/a Somerset School v Van Aswegen 1992 (1) SA 807 (W); Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C).

152. McBryde 596.

153. Express Dairy Co Ltd v Jackson (1929) 46 TLR 147; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1375; Chitty 1209; Treitel 407; Malden Timber Ltd v McLeish 1992 SLT 727 at 733 although with some hesitation; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1120; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 307; Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W) 858; Christie 447; Kerr 517.

154. See however Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452, Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) 862.

155. Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1105-1106 but see infra.

- They can, in certain cases, still play a role in limiting protection to those customers of the business who exist within a particular area. Thus it may play a role in delineating customers especially where the employee's sphere of activity was geographically defined [156]. Cases that did not properly appreciate the significance of such limitations [157] must be approached with caution.
- Sometimes the covenantor is not only restricted from dealing with customers while they are customers of the business. It has been contended that a spatial restriction will be needed if the covenantee only operates within a certain area because that will allow the covenantor to deal with those customers in areas where dealings will not be in competition with the covenantee [158]. This seems in line with general principles. Yet, in *GW Plowman* [159] the court maintained that a covenantee may still wish to keep a connection even outside his sphere of business. This may be the case, but the nature of the business and the nature of the customer will mostly show that there are still vast areas where there will be no interest in maintaining such connections. The issue was not properly discussed in *GW Plowman*. A more important argument is probably that wider geographical restriction will often be unnecessary as it is unlikely that the employee will meet the customers outside the sphere of influence of the covenantee [160]. Accordingly further geographical limitations will probably seldom be required.
- It will still be important for the determination of the attitude of the courts towards the restraint if the effect of the non-dealing restraint is that it is very wide or world-wide [161].

It has been maintained by some of the authorities that duration limitations will not carry much weight in these cases [162], but this view cannot be accepted. These types of restraints will not have the same type of incidental impact on duration as it will have on space. It will still have to be limited separately [163]. These narrow non-dealing and non-solicitation restraints on the one hand and temporal restrictions on the other will only impact upon each other in a much more general manner [164]. The cases invoked in support of a contrary principle by Chitty [165] and Heydon [166]

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156. The Marley Tile Co Ltd v Johnson [1982] IRLR 75; Scottish Agricultural Industries plc v Richard 1990 GWD 13-640; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C).
157. Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248, See Scotcoast Ltd v Halliday 1995 GWD 7-355; Malden Timber Ltd v McLeish 1992 SLT 727 at 733; SOS Bureau Ltd v Payne 1982 SLT ShCt 33; See infra.
158. Jenkins v Reid [1948] 1 All ER 471 at 481.
159. GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13, Mentioned Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 57.
160. Rannie v Irvine (1844) 7 Man & G 969 at 976-977, 978, 978-979; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1233, 1234-1235.
161. See infra Ch 9.10.
162. Heydon 152; Chitty 1209.
163. Blake 675; See e.g. Mulvein v Murray 1908 SC 528 at 531 did not ignore the time restriction; McBryde 596.
164. See infra 6.

cannot be accepted. The wide approach in pre-*Mason* cases [167] will today be unacceptable. Most modern authorities relied on concerned different issues [168]. *Gilford* actually enforced a lifelong restraint, but the length of the restraint was not discussed [169].

In these cases the most important question will be: Which customers can be protected? Customers will be the standard, and the validity of the restraint will depend on whether such customers are protectable. Dealings or solicitation may only be prohibited against customers if they or knowledge about them constitute legitimate interests of the covenantee.

The type of trade secret that is usually protectable here is customer information. A wide view of the customers that may not be dealt with or solicited in such cases was taken in *Gilford*, but the views expressed there cannot be accepted [170]. Customers may only be protected in so far as their names or other information about them form part of the protectable secret. Moreover, those customers may only be protected against a particular employee if that employee had knowledge of the customer secret [171]. However, courts should not ignore the fact that an employer at conclusion does not know which customers would be protectable, because the employee would have information about them [172].

Some confusion as to which customers can be protected has also arisen in cases where customer connections are protected by non-solicitation and non-dealing restraints [173]. The theoretically most acceptable view, which is also accepted in the *Austin Knight* case [174], is that, as a general rule, only those customers with whom the covenantor has formed connections may be protected [175].

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165. Chitty 1209.
166. Heydon 152.
167. Ward v Byrne (1839) 5 M & W 548; Nicholls v Stretton (1843) 7 Beav 42, (1847) 10 QB 346; May v O'Neil (1875) 44 LJCh 660; Dubowski & Sons v Goldstein [1896] 1 QB 478; Lewis & Lewis v Durnford (1907) 24 TLR 64.
168. Dubowski & Sons v Goldstein [1896] 1 QB 478 at 483; Mason at 734, 741; East Essex Farmers Ltd v Holder [1926] WN 230; Konski v Peet [1915] 1 Ch 530 at 538-539; GW Plowman & son Ltd v Ash [1964] 2 All ER 10.
169. Gilford Motor Co Ltd v Horne [1933] Ch 935, But see the court a quo 949.
170. Gilford Motor Co Ltd v Horne [1933] Ch 935 at 964, 968, See the more acceptable approach 948-949, See Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 56 and the explanation cannot be accepted; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 see supra.
171. See Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868; See supra Ch 6.5.1.
172. This seems to have played a role in Gilford Motor Co Ltd v Horne [1933] Ch 935 at 962, 967-968 although the dictum is confusing.
173. Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1231.
174. Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 56-58, See supra Ch 4.4.
175. Spafax (1965) Ltd v Dommett (1972) 116 Sol Jo 711; Financial Collection Agencies (UK) Ltd v Batey (1973) 117 Sol Jo 416; See Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401; The Marley Tile Co Ltd v Johnson [1982] IRLR 75; See already British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68; Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at 356; See Steiner v Breslin 1979 SLT (Notes) 34 where this view was apparently preferred; See National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T)

There are many cases which may create a different impression, but only a handful must be rejected outright [176]. Most of the cases in which restraints have been condoned by the courts can be explained away, although they extend beyond the customers with whom the covenantor had contact [177]. Some of these cases were decided before the narrow principles that apply today had properly developed [178]. Others actually concerned the protection of wider information about customers, whether in the form of trade secrets or otherwise [179].

Most importantly, an exception to the general principles will exist on the ground of pragmatism [180]. At conclusion of the contract the covenantee in a post-employment or partnership case might find it difficult to determine which customers would be protectable vis-à-vis the employee. This will be considered by the court in determining reasonableness in England and Scotland [181]. The terms are laid down at conclusion of the contract and reasonableness is determined from this point of view [182]. The real position with hindsight may be quite different from the facts as perceived from the moment of conclusion. The employer can at least look at what is likely if he, at conclusion, knows that the employee will get into contact with customers, but it is impossible to determine exactly which customers.

In South Africa problems of this kind will probably be solved along a different route. Here the reasonableness will be determined when the court is asked to enforce the restraint. The restraint will be regarded as unreasonable if it is shown that the customers that could be protected differ

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especially 1109-1110 where a restraint was so limited by interpretation; Cf Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) 862 where the reasons given are unacceptable; Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W) 858-859; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 438.

176. GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13F, See the criticism of Heydon 154; Business Seating (Renovations) Ltd v Broad [1989] ICR 729; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1373, 1376, 1377 although some passages may also be more narrowly interpreted; Smith & Wood 139.

177. See McBryde 596-597.

178. Mills v Dunham [1891] 1 Ch 576; Mulvein v Murray 1908 SC 528 at 531, 532, 534.

179. GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 14, Cf also the explanation Austin Knight (UK) Ltd v Hinds [1994] FSR 52 at 57-58, See the criticism supra Ch 6.4.5; John Michael Design plc v Cooke [1987] 2 All ER 332 although it was not properly investigated; Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248; Malden Timber Ltd v McLeish 1992 SLT 727 at 733; Probably Rentokil Ltd v Kramer 1986 SLT 114 at 116, See McBryde 599; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 405-406; See Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 457; See the criticism supra Ch 6.4.5.

180. See Davies v Davies (1887) 36 ChD 359 at 366 on the practical difficulties.

181. GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13D-E, 14; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1235.

182. See infra Ch 13.

considerably from the customers that were protected. However, the court should allow partial enforcement in such cases [183].

However, another obstacle will not be insurmountable in these cases. Courts were initially sceptical of restraints where restricted customers were not known to the covenantor [184]. But today it will not sway the English and Scots courts towards invalidating a restraint if all other requirements are met [185]. The court in *GW Plowman* gave two reasons for this conclusion:

- An interdict or injunction specifically against dealing with unknown customers will not be granted [186].
- The covenantor can ask potential customers whether they are customers of the covenantee.

A different approach appears to have been followed in South Africa [187], but the English and Scottish approach is a fairer solution to a difficult problem.

Still, lack of knowledge about customers will not be completely without effect. It will be relevant in the granting of interdict, and it may play some role in determining the attitude of the court towards the restraint in general [188]. Moreover, the principle must not be taken out of context. It does not provide justification for a restraint that is otherwise too wide. It only entails that lack of knowledge will cause no further objection to reasonableness if the restraint is in other respects reasonable [189].

Finally, courts have sometimes preferred restraints that prohibit solicitation or dealings with customers of the covenantee as opposed to restrictions that limit wider business activities within a restricted area. Judges have submitted that the narrower types of restraints will increase the likelihood for reasonableness [190]. They have suggested that a non-dealing or non-solicitation

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183. See infra Ch 14.

184. Rannie v Irvine (1844) 7 Man & G 969 although it was not clearly discussed; Baines v Geary (1887) 35 ChD 154 at 156 although the point was not clearly made here either; Dubowski & Sons v Goldstein [1896] 1 QB 478 at 482, See contra 486; Konski v Peet [1915] 1 Ch 530 at 539; Jenkins v Reid [1948] 1 All ER 471 at 481; See Treitel 405.

185. Doubt was previously expressed about such a principle: Konski v Peet [1915] 1 Ch 530 at 539; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 949; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 14; Business Seating (Renovations) Ltd v Broad [1989] ICR 729 at 733-734; Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248; Rentokil Ltd v Kramer 1986 SLT 114 at 116; Aramark plc v Sommerville 1995 GWD 8-408 is perhaps too wide; Hutchison & Craft v Burns 1994 GWD 26-1547; McBryde 597.

186. See Gilford Motor Co Ltd v Horne [1933] Ch 935 at 964, Cf 949 where it was not regarded as conclusive.

187. Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) 862; Cf National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1110 this question was avoided by interpretation.

188. Treitel 407 stated that the courts are more likely to enforce a restraint where it is limited to known customers.

189. Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248 cannot be accepted.

190. Davies v Davies (1887) 36 ChD 359 at 366; Heydon 150; Davies 493.

restraint would have been reasonable where wider restraints were found to be wanting [191]. It has even been accepted that non-solicitation or non-dealing of certain customers of the employee would be the only acceptable technique for limiting certain restraints [192]. But there are also cases where the courts have accepted that wider protection is justified [193]. The lenient 19th-century approach [194] will not be acceptable today, but wider restraints can still be justified on certain grounds.

In sales of businesses goodwill, as a protectable interest, will generally justify wider protection [195]. In *Allied Dunbar* [196] Millett J accepted that a restraint could be widely framed, as a narrower restraint would be too difficult to police.

Wider restraints will normally be justifiable where confidential information lies at the basis of protection [197]. In *SW Strange* [198] the court accepted that a restraint against non-solicitation could be exacted for the protection of information about the names and addresses of customers. However, a restraint against carrying on wider business activities within the whole area where customers existed was rejected. But the problem will frequently still be disclosure of information about customers. *SW Strange* can only be explained on the basis that customer connections and trade secrets were not properly distinguished.

Many complex issues will have to be considered in determining whether only narrower restraints will be accepted where the protectable interest is customer connections. The strictest approach was followed here.

Two aspects have been pivotal:

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191. Eastes v Russ [1914] 1 Ch 468 at 491; See Stenhouse Australia Ltd v Phillips [1974] AC 391 at 404; Spencer v Marchington [1988] IRLR 392 at 396; Chitty 1206; Although a clear view was not expressed Steiner v Breslin 1979 SLT (Notes) 34 can be contrasted; Ex parte Spring 1951 (3) SA 475 (C) 479.

192. See infra; Blake 663 and especially 681; Heydon *McGill* 345.

193. See the careful opinions Attwood v Lamont [1920] 3 KB 571 at 578, 597; Putsman v Taylor [1927] 1 KB 637 at 642; Trebilcock 93 and the discussion 99-103; Ex parte Spring 1951 (3) SA 475 (C) 479 although it was not justified on the facts in casu.

194. Proctor v Sargent (1840) 2 Man & G 20 and the exchanges between counsel and Tindal CJ; Davies v Davies (1887) 36 ChD 359 at 366.

195. See Heydon 186 but see the general criticism supra Ch 6; Cowan v Pomeroy 1952 (3) SA 645 (C) 650.

196. Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64-65.

197. SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 35-36, 37; McBryde 596.

198. SW Strange Ltd v Mann [1965] 1 WLR 629 at 642, See SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 37 although the cases cannot simply be justified on this basis.

- The court will have to ask whether it was practically possible to frame a covenant that was only related to some or all customers. Where the covenantee's business concerns the general public, it will often be very difficult to delineate the customers that may be protected [199].
- For the covenantee, one of the great advantages of a geographically limited restraint (as opposed to some of the more limited activity based restrictions) is that the covenantor can be prohibited from performing clearly definable and conspicuous activities within a certain area. Such covenants will be more easily policed [200].

The question whether customers are for credit or on the books will be particularly relevant under the second rubric [201]. It has been accepted that the more narrow restraints will not be sufficient in cases where cash customers form a substantial part of the business [202], while conversely courts have sometimes insisted on narrower non-solicitation or non-dealing restraints where customers are on the books or where they deal with the business for credit [203]. Nevertheless, the question of the existence of cash customers must not be exaggerated. It remains only one factor, albeit important, in the determination of whether only a narrower restraint should be allowed. The various different issues must be considered as a whole and have to be balanced [204].

In *Nachtsheim* [205] one of the grounds upon which a wider restriction was accepted was that the covenantor, who was a hairdresser, could still attract customers if employed by a rival concern even if he personally carefully avoided dealing with or soliciting customers. It was accepted that the covenantor could still be used as an "instrument for diverting customers" e.g. through advertisements that the covenantor is now connected to the rival business. This may be a ground for wider protection in some cases, although it will have to be shown that there is a likelihood that customers can be so attracted by a rival. Thus in *SW Strange* [206] Stamp J was prepared to allow a

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199. Blake 661; Heydon 150; Putsman v Taylor [1927] 1 KB 637 at 642.
200. Putsman v Taylor [1927] 1 KB 637 at 642; T Lucas & Co Ltd v Mitchell [1974] 1 Ch 129 at 135, See Gurry 216; This is inherent in the arguments of the court in Scorer v Seymour Jones [1966] 1 WLR 1419 at 1427, Heydon *McGill* 346; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 157; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 37; Lewin v Sanders 1937 SR 147 at 150; Nachtsheim v Overath 1968 (2) SA 270 (C) 274-275.
201. T Lucas & Co Ltd v Mitchell [1974] Ch 129 at 135; Heydon 150.
202. Empire Meat Co Ltd v Patrick [1939] 1 All ER 606 at 610 affirmed [1939] 2 All ER 85 at 94. SW Strange Ltd v Mann [1965] 1 WLR 629 at 640.
203. SW Strange Ltd v Mann [1965] 1 WLR 629 at 641; MacFarlane v Kent [1965] 1 WLR 1019 at 1024 was inclined to the view that only non-solicitation or non-dealing restraints would be allowed; Chitty 1209; Heydon *McGill* 345.
204. Cf SW Strange Ltd v Mann [1965] 1 WLR 629 at 640; This issue could have swayed the argument for the covenantor in Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) see the observations of the court 444. However it was not discussed in the case.
205. Nachtsheim v Overath 1968 (2) SA 270 (C) 274; See SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 37.
206. SW Strange Ltd v Mann [1965] 1 WLR 629 at 640.

restraint of wider activities on this basis. However, he held that the covenantor in casu would not have this ability.

The spread of customers through a particular area may be of significance. Courts will often require non-dealing or non-solicitation restraints based on protectable customers if they are spread out over a wide area that is densely populated with other possible customers [207]. Again this will have to be weighed against factors like the ability to identify customers.

Non-dealing and non-solicitation restraints, based on customers, will allow for the closest possible delineation of especially customer connections and trade secrets in the form of customer information. By using techniques like these, the covenantee can almost secure the validity of a restraint. However, the negative factors must be kept in mind by covenantees who opt for this type of protection:

- These restraints are more precise but because of their precision greater accuracy of delineation of interests will probably be required before an interest will be regarded as reasonable. Clauses must be drafted carefully.
- Greater precision means smaller scope. The restraint might therefore not provide sufficient protection for the covenantee [208].

5.5. Non-disclosure and non-use of trade secret covenants

A covenantor may also be restricted from using or disclosing trade secrets [209], and these restrictions can be discussed together, although they also differ in some respects:

- There may be cases where non-use restraint will not be allowed even though non-disclosure and other types of restraints might be enforced [210].
- Non-disclosure still leaves the covenantor free to use trade secrets [211]. Where a trade secret is of such a nature that it can be abused by the covenantor through use, a non-disclosure restraint will provide no real protection for the covenantee.

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[207]. See already Proctor v Sargent (1840) 2 Man & G 20; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1373-1374, 1376, 1377, Cf Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 331-332 where Gledhow was quoted although the case concerned a different issue; Blake 679, 681; Heydon 149; Heydon *McGill* 345-346.

[208]. Scottish Farmer's Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 157; McBryde 596.

[209]. Cf also Chitty 1206 on a restraint not to sell trade secrets.

[210]. See supra Ch 6.5.6.

[211]. Haynes v Doman [1899] 2 Ch 13 at 29; Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 207-208, See McBryde 599, Systems Reliability Holdings plc v Smith [1990] IRLR 377 384-385; MacQueen *Stair Encyclopaedia* 1467; On the meaning of disclosure see Clark v Electronic Applications (Commercial) Ltd [1963] RPC 234.

Neither covenantees nor the courts have been enthusiastic about non-disclosure and non-use restraints as a means for protecting trade secrets.

These types of restraints will have to comply with the same reasonableness requirements as other types of restraints [212]. It was not always appreciated [213], but the restraint will have to be limited to use and disclosure of *trade secrets* [214]. However, they will often be acceptable in terms of the restraint of trade doctrine [215], and this will seldom be in issue as the covenantee will, mostly, still be able to rely on an implied term for protecting non-disclosure or use [216].

Moreover, courts will often be reluctant to enforce these types of restraints. It will be very difficult for a covenantor to determine which elements of knowledge are trade secrets if the protectable trade secret in a particular case is not clear and separate from other information. The covenantor may be placed in an impossible position if the covenant prohibits use or disclosure, and the courts will often refuse to enforce such terms, whether express or implied [217].

Finally, non-disclosure and non-use of trade secret restraints, whether express or implied, will seldom provide proper protection even if reasonable and enforceable by interdict or injunction [218].

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212. Mainmet Holdings plc v Austin [1991] FSR 538 at 542.

213. Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447; Forster and Sons Ltd v Suggett [1918] 35 TLR 87; Under Water Welders and Repairers Ltd v Street & Longthorne [1968] RPC 498; Marks v Luntz 1915 CPD 712

214. Triplex Safety Glass Co v Scorah [1938] Ch 211 at 215, 216; Clark v Electronic Applications (Commercial) Ltd [1963] RPC 234 at 237-238 where the clause was narrowed by interpretation; GD Searle Ltd v Celltech Ltd [1982] FSR 92 at 101; Ixora Trading Inc v Jones [1990] FSR 251 at 259; Blake 669; Gurry 204ff; Treitel 408 and the discussion of Lawrence David Ltd v Ashton [1989] ICR 123; See the clause in Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 although the issue was not discussed; Malden Timber Ltd v McLeish 1992 SLT 727 at 734; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 although it was not attacked on this basis here; Malden Timber Ltd v Leitch 1992 SLT 757 at 762-763; McBryde 599; See the clause Filmer v Van Straaten 1965 (2) SA 575 (W) 577-578 where the interdict was not granted for other reasons.

215. Leather Cloth Co v Lorsont (1869) LR 9 Eq 345 at 354; Caribonum Co Ltd v Le Couch (1913) 109 LT 385 and 587; Haynes v Doman [1899] 2 Ch 13; Herbert Morris 715; Forster & Sons Ltd v Suggett (1918) 35 TLR 87 although it was not discussed; See Ropeways Ltd v Hoyle (1919) 120 LT 538 at 543; Clark v Electronic Applications (Commercial) Ltd [1963] RPC 234 at 236; Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 208, 209 but see supra 6.5.1, 6.5.2.3; PSM International plc v Whitehouse [1992] IRLR 279 but see how the interdict was limited 281; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 24; CR Smith Glaziers (Dunfermline) Ltd v McKeag 1987 GWD 1-2; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 453, Cf also Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 351 there are cases where such restraints will also be unreasonable for being too long.

216. Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71 and the concessions of counsel.

217. Supra Ch 6.5.6.

218. Cf already Hagg v Darley (1878) 47 LJCh 567 with reference to Allsopp v Wheatcroft (1873) LR 15 Eq 59; Cf the narrow approach towards use of a trade secret Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 350-351; See Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160 although this must not be confused with the other distinctions mentioned here; Woolman 255; See also the criticism Living Design (Home Improvement) Ltd v

- It will often be very difficult to police these restraints [219]. Many, if not most, trade secrets can be ascertained through independent research by competitors [220], and it will often be almost impossible to determine through which avenue a competitor has acquired the secret. The covenantee will find it difficult to anticipate a breach without wider restraint [221]. It will be impossible to determine exactly when trade secrets are used by the covenantor [222] and proof of breach will be a Herculean task [223] when the covenantor is afterwards employed in a position where utilisation of the trade secret will be useful to his new employer.
- The risk of circumvention is enormous. It will be very difficult for the covenantor to refrain from using or disclosing trade secrets if he performs functions that may require the use of similar information. The potential for intentional and even inadvertent breach is just too great [224].

6. Interaction between the different techniques for limiting the scope of a restraint

Although the different techniques have been discussed separately, it must be underlined that each seldom stands alone. A restraint will consist of a combination of techniques. Thus the court will have to determine the validity of a restraint by looking at the totality of limiting techniques employed by the covenantee [225]. It has been said that a restriction which is geographically too wide, or too wide with regard to activities prohibited, cannot be saved by a substantial temporal limitation [226], and this is correct. Where one aspect of a restraint is too wide, it cannot be saved by

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Davidson [1994] IRLR 69 at 71 infra Ch 15; Cf also Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 511 is too simplistic.

219. BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57-58.

220. See supra Ch 6.5.2.1.

221. Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 449; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 28, See MacQueen *Stair Encyclopaedia* 1468.

222. Leather Cloth Co v Lorsont (1869) LR 9 Eq 345 at 354; Gurry 204; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36; McBryde 596; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57.

223. Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 449; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1479, Quoted in a case of a different nature Provident Financial Group plc v Hayward [1989] ICR 160 at 166, See Freight Bureau (Pty) Ltd v Kruger 1979 (4) SA 337 (W) 340; JA Mont (UK) Ltd v Mills [1993] FSR 577 at 581 and the view of the court a quo the Littlewoods infra passage is also often quoted at 581, 587, 590; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57.

224. Haynes v Doman [1899] 2 Ch 13 at 29, See JA Mont (UK) Ltd v Mills [1993] FSR 577 at 587; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 395; See Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 385; Blake 669-670; Gurry 204; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57-58.

225. Putsman v Taylor [1927] 1 KB 637 at 642; Blake 675; Trebilcock 92; Wilkinson v Wiggill 1939 NPD 4 at 16; Dempsey v Shambo 1936 EDL 330 at 336, 337; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 614; Christie 446; Cf Stenhouse Australia Ltd v Phillips [1974] AC 391 at 403, McBryde 604 on the cumulative effect of different restraints.

226. SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 at 423; Financial Collection Agencies (UK) Ltd v Batey (1973) 117 Sol Jo 416; Heydon 158; Minimax Ltd v Geddes (1914) 31 ShCt Rep 36 at 39; Fraser 92; Federal Insurance Corporation of SA Ltd v Van Almelo (1908) 25 SC 940 at 944; Cf Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 406.

another. But temporal limitation will play an important role in determining whether a restraint is otherwise too wide where the position is not clear [227]. All limiting techniques play a role in ensuring that a restraint corresponds to protectable interests but they also interact on a second level [228]. The narrow scope of certain techniques should ensure that the court is more positively disposed towards other techniques [229], and conversely the court should be careful in determining the reasonableness of other elements where one aspect such as duration is very wide [230]. Thus, duration restrictions may still play some role in determining reasonableness in sale of business cases where other factors are in doubt, although such restrictions will seldom be necessary in these cases [231].

7. The factual matrix

The impression should not be created that the determination of reasonableness in terms of legitimate interests is a mechanical process. It is often even more difficult to apply principles and rules to specific restraints than it is to apply principles to facts in most other areas of private law. It is fundamentally important that each case be decided on its own facts [232]. The courts have substantial leeway in determining when a restraint will go no further than to protect a legitimate interest [233]. The legal rules and principles must be flexibly applied [234].

Yet, courts will be assisted by the factual matrix [235]. When they determine reasonableness in terms of the test explained above, they are confronted with considerable opacity. However, important factual aspects will be taken into consideration in applying the above mentioned rules and principles to facts, and greater precision, consistency, and predictability can be achieved by formally recognising the influence of these factors.

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227. Proctor v Sargent (1840) 2 Man & G 20 at 33; SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 at 423; Dickson v Jones [1939] 3 All ER 182 at 189; Fraser 92; Heydon 158; Katz v Efthimiou 1948 (4) SA 603 (O) 613; Berger v Osher 1965 (1) SA 558 (W) 559, See Kerr 515.

228. Supra further on the interaction between spatial and temporal restraints supra 4.

229. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1105; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 544, Kerr 515 referring to Kin v Sharneck 1959 (3) SA 534 (E) although this point was not explicitly made in the case.

230. Cf Winfield (1946) 325 with reference to Eastes v Russ [1914] 1 Ch 468 probably at 490-491.

231. See supra 4.

232. Proctor v Sargent (1840) 2 Man & G 20 at 33; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 12; Estate Matthews v Redelinghuys 1927 WLD 307 at 314; Weinberg v Mervis 1953 (3) SA 863 (C) 868-869; Berger v Osher 1965 (1) SA 558 (W) 559; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 4; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 239; Kerr 514; Supra.

233. Davis v Mason (1793) 5 Term Rep 118 referred to by Wilberforce Campbell and Elles 145; Horner v Graves (1831) 7 Bing 735 at 743; Whitehill v Bradford [1952] Ch 236 at 245; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1425; Woolman 253 but see the criticism infra Ch 9.

234. Cf Esso 593, See Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402, McBryde 593.

235. Lindley 10-183.

Some certainty can be infused into the system by considering the type or nature of a business [236], the general or usual practice among businessmen in a particular industry [237], the opinions of mercantile men about certain industries [238], and the position and role of competitors [239] in determining the validity of all different kinds of restraint. Furthermore, the consideration of the type of employment as well as the duties and the position of the employee [240] will be important in determining the reasonableness of any restraint on an employee, while the type of customers [241] will be particularly germane when considering the reasonableness of restraints based on trade secrets in the form of customer information or customer connections [242].

Finally, the width of the restraint will play an important role in establishing reasonableness. Courts have often stated that it will be more difficult to show that the restraint is reasonable where it is

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[236]. Hitchcock v Coker (1837) 6 Ad & E 438 at 454; Proctor v Sargent (1840) 2 Man & G 20; See the answer of counsel in Nicholls v Stretton (1847) 10 QB 346 at 353-354 to the question from the bench; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 452; Rogers v Maddocks [1892] 3 Ch 346 at 356; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 770, 772; Mason 732; Eastes v Russ [1914] 1 Ch 468 at 474, 486; Millers Ltd v Steedman (1915) 31 TLR 413 at 416; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 13; Vincents of Reading v Fogden (1932) 48 TLR 613; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 946, 947, 966; M & S Drapers v Reynolds [1956] 3 All ER 814 at 817; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1373; Chitty 1200; Farwell 68; Gurry 215; McBryde 602; Empire Theatres Co Ltd v Lamor 1910 WLD 289 at 291; Berger v Osher 1965 (1) SA 558 (W) 559; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 70-71; Christie 447; Kerr 515 with reference to David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 436, 437, Kerr 516.

[237]. Benwell v Inns (1857) 24 Beav 307; Catt v Tourle (1869) LR 4 Ch App 654; Cornwall v Hawkins (1872) 41 LJCh 435; Haynes v Doman [1899] 2 Ch 13 at 24; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 768, 770 and 773; Mason 732; SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 at 426; Millers Ltd v Steedman (1915) 31 TLR 413 at 416; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 11; Dickson v Jones [1939] 3 All ER 182 at 189; Luck v Davenport-Smith [1977] EG 73 at 90; See Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193 at 210, See Turner 128 and the lament in Merryweather v Moore [1892] 2 Ch 518 at 521; Lindley 10-183; Cheshire Fifoot and Furmston 405-406; Cf however Heydon 162 and the discussion of Farwell 69-70; Cf however Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1115; McBryde 602; Estate Matthews v Redelinghuys 1927 WLD 307 at 311; Lewin v Sanders 1937 SR 147 at 150, 152; Schoombee 150.

[238]. Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453; Caribonum Co Ltd v Le Couch (1913) 109 LT 385 at 389.

[239]. Commercial Plastics Ltd v Vincent [1965] 1 QB 623; McBryde 602.

[240]. Horner v Graves (1831) 7 Bing 735 at 744; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 770 see 767; Pearks (Ltd) v Cullen (1912) 28 TLR 371 at 372; Millers Ltd v Steedman (1915) 31 TLR 413 at 414; Putsman v Taylor [1927] 1 KB 637 at 648; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 946, 962, 966; Dickson v Jones [1939] 3 All ER 182 at 188; JW Chafer Ltd v Lilley [1947] LJR 231 at 233; Vincents of Reading v Fogden (1932) 48 TLR 613 at 614; M & S Drapers v Reynolds [1956] 3 All ER 814 at 815, 817; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13; SW Strange Ltd v Mann [1965] 1 WLR 629 at 640; On Bridge v Deacons [1984] AC 705 at 714; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Anson 327; Blake 661-662; Chitty 1206; Farwell 68; Gurry 215; Heydon 110, 115-118; Selwyn 387; Smith & Wood 140; Walker 188; Estate Matthews v Redelinghuys 1927 WLD 307 at 312; Christie 447 and Kerr 514.

[241]. Cheshire Fifoot and Furmston 408-409; Chitty 1207; McBryde 602.

[242]. See also most of these aspects are mentioned by Anson 323.

very wide [243]. The wider the restraint, the more suspicious the court should be, as it takes more extraordinary interests to justify expansive restraints.

[243]. Herbert Morris 715; Attwood v Lamont [1920] 3 KB 571 at 589; M & S Drapers v Reynolds [1956] 3 All ER 814 at 816, 819; Cheshire Fifoot and Furmston 409; Chitty 1209; McBryde 604; Estate Matthews v Redelinghuys 1927 WLD 307 at 311, Halliwell v Laverack 1929 WLD 175 at 179, Katz v Efthimiou 1948 (4) SA 603 (O) 613; Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 721; Kerr 514.

Chapter 9

Wider reasonableness issues

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1. Factors that will influence the attitudes of the court towards a particular restraint

Reasonableness factors beyond the interests of the covenantee will also have an influence on the reasonableness question [1]. But these factors are not simply weighed against the interests of the covenantee.

The stance that can be gleaned from the decisions cannot really be accommodated within a traditional approach which accepts that law is a set of rules applied to factual situations. Opaque concepts such as public policy and reasonableness come into play and a more subtle approach will have to be followed. The test for reasonableness based on the interests of the covenantee is not precise. It leaves wide room for discretion, and contextualisation will take place [2].

Further factors affect the "attitude" of the court towards interests. Traditionalists might find the concept of "attitude" peculiar, but it is submitted that the development of the restraint of trade doctrine cannot be explained without it. The courts have not developed it eo nomine. Yet it can still be found behind many veils [3].

2. Differences in the attitudes of the courts with regard to employer and employee restraints on the one hand and sale of business restrictions on the other

Different interests will be protectable in sale of goodwill and post-employment cases. However, the distinction also operates on a second level. Courts have often stressed that a stricter approach should be followed in determining the effectiveness of post-employment restrictions and that a more benevolent attitude should be taken to sales of businesses [4]. Sometimes judges merely intend

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1. Supra Ch 6, 7 some of these factors have already been discussed.
2. Guest 6-7 although his discussion of the factors that will further influence the doctrine is not always satisfactory.
3. See infra Ch 11.3.
4. Mason 737-738, It was interpreted as being more interest-related in Herbert Morris 713-714, Mason 731, 734 is also sometimes mentioned as authority for the point that the different types of contracts must be distinguished. But the principle was not clearly asserted here; Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 84-85; Great Western and Metropolitan Dairies (Ltd) v Gibbs (1918) 34 TLR 344 at 345; English Hop Growers Ltd v Dering [1928] 2 KB 174 at 180-181; Spink (Bournemouth) Ltd v Spink [1936] Ch 544 at 547; Electric Transmission Ltd v Dannenberg (1949) 66 RPC 183 at 188 where the court emphasised that it should be strict in interpreting clauses in employment cases; Routh v Jones [1947] 1 All ER 179 at 183-184; Whitehill v Bradford [1952] 1 Ch 236 at 245-246; Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 270 where it was stressed in a discussion of severability; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 238-239; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1375-1376; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 136; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 64; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 382; Anson 328; Cheshire Fifoot and Furmston 400; Chitty 1203, 1212; Heydon 78; Winfield (1946) 320; Treitel 404; Trebilcock 64; Kennedy v Clark (1917) 33 ShCt Rep 136 at 140; Randev v Pattar 1985 SLT 270; It was common cause between counsel in Malden Timber Ltd v McLeish 1992 SLT 727 at 731, Malden was also accepted in Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1157 read with 1160, The arguments were utilised by both counsel

to state that narrower interests will be protectable in sale of goodwill cases, but it seems that a wider point is also often made. The reasons for the distinction on an attitudinal level will therefore have to be sought.

Some grounds for distinguishing the different types of restraints cannot be accepted:

- It has been suggested that the two types of restraints should be distinguished because the public will be deprived of the service of an employee in post-employment cases or because the employee has the right to earn a living [5]. However, all restraints that fall within the doctrine do so because they interfere with freedom of work [6], and this principle includes both these elements. In goodwill cases the business is transferred but the skill of the particular individual is still lost to society. The seller of goodwill receives money in return but it may run out quickly, in which case he will still be deprived of a living.
- It has been noted that the courts should be less strict in sale of goodwill cases because the aim of sellers is to retire from the business while this is not the position in employment cases [7]. However, this factor cannot continuously lie at the basis of the distinction between the two types of employment. Retirement will be an important factor which the courts should consider when determining their attitude towards a restraint, but it cannot be discounted by the different types of contracts [8].

Most importantly, bargaining power cannot be consistently used to distinguish the different types of contracts [9]:

- Parties to employment restrictions are often also in a position of equal bargaining, especially in the type of case where a restraint of trade is relevant e.g. where a scientist or director of a

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Malden Timber Ltd v Leitch 1992 SLT 757 at 760; Christie *Encyclopaedia* 593-594; Scott Robinson 158; McBryde 590; Walker 184, 187; Woolman 254; New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 83, Brooks and Wynberg v New United Yeast Distributors (Pty) Ltd 1936 TPD 296 at 308 with reference to English Hop Growers and North Western Salt; Durban Rickshas Ltd v Ball 1933 NPD 479 at 494 and see the discussion 492; Cowan v Pomeroy 1952 (3) SA 645 (C) 649; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; Wohlman v Buron 1970 (2) SA 760 (C) 762; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 235.

5. Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 90; Great Western and Metropolitan Dairies (Ltd) v Gibbs (1918) 34 TLR 344 at 345; Whitehill v Bradford [1952] 1 Ch 236 at 246, Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1376; Some of the arguments of Heydon's 82-83; Wilkinson v Wiggill 1939 NPD 4 at 12; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 198.

6. See supra Ch 3.7ff.

7. Cf the argument Wallis v Day (1837) 2 M & W 273 at 280; Nordenfelt 567 quoted in Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 810; Trebilcock 232.

8. See infra 8.

9. Roffey v Catterall Edwards and Goudre 1977 (4) SA 494 (N) 499, See Otto 209, Aronstam 24, Lubbe and Murray 257.

company concludes a post-employment restraint, or where a person's skills are in particular demand and there is a shortage of such skills [10].

- Trade unions will often look after the interests of the individual in employment contracts even where individual parties are not in a position of equal bargaining [11]. Atiyah [12] correctly observes that restraints will mostly be concluded in non-union fields of activity. But there might still be contracts where this is relevant.
- Parties to sale of goodwill restrictions are not always in a position of equal bargaining. What manifests itself as a sale of goodwill might be a big concern buying out small competitors [13].

There is no need to distinguish between the different types of restraints on this basis and the bargaining position of the parties cannot be deduced from the type of agreement [14].

The court in *Recycling Industries* [15] attempted to revive bargaining power here. It was acknowledged that some exceptions would exist, but it was suggested that courts should simply compensate for such exceptions. In *M & S Drapers* [16] Lord Denning also accepted that not all restraints on employees would be concluded on an equal basis, but he apparently connected bargaining power to the type of contract. However, this approach will be methodologically

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[10]. See M & S Drapers v Reynolds [1956] 3 All ER 814 at 821 distinguished from Gilford Motor Co v Horne [1933] Ch 935. The position of a director and a traveller are quite different. This may be one reason for the distinction, See also infra for another explanation; Heydon 82; Heydon *McGill* 342; Treitel 404; Woolman 257 asked whether it can ever be said in the current employment market that parties are also equal. But the type of employees whose services warrant restraints will often be sought after; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 247, Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 66-67 citing Turpin *Annual Survey* (1958) 55-56; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 72-73; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 359; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258 but see infra; Christie 440; This appears to be the implication of the question of Lubbe and Murray 257; Kerr 506-507; For cases where the covenantor was in a strong bargaining position: Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447, Measures Bros Ltd v Measures [1910] 2 Ch 248, Littlewoods Organisation Ltd v Harris [1978] 1 All ER 1026 at 1032; On the importance the position of the employee supra Ch 8.7.

[11]. Atiyah 340; Cheshire Fifoot and Furmston 400; Heydon 81-82; Heydon *McGill* 343; Treitel 404; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 72; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258 but see infra; Van der Merwe 158; See Nelson's Laundries Ltd v Manning (1956) 51 DLR (2d) 537 at 545 (BCSC) where the court considered that a trade union had helped to frame a restraint in its determination of reasonableness.

[12]. Atiyah 341; Cheshire Fifoot and Furmston 400.

[13]. Heydon 82; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 72; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258 but see infra; Christie 440 merely states that the possibility of inequality exists in all cases.

[14]. Malan v Van Jaarsveld 1972 (2) SA 243 (C) 247 but see the criticism of the case supra; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 66; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 72-73; Roffey v Catterall Edwards and Goudre 1977 (4) SA 494 (N) 499-500; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 403; Kerr 506.

[15]. Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258; See also Trebilcock 64-65 who still sees bargaining power as being at the basis of the distinction.

[16]. M & S Drapers v Reynolds [1956] 3 All ER 814 at 820-821.

unacceptable. Bargaining power is separately important with many subtleties. Separate investigation will allow for better evaluation of this factor. In reality bargaining power is not consistent enough with the distinction to be of much use. In *Recycling* the court also looked at bargaining power separately, despite its professed scheme. At most the type of contract can only be used as one factor that will assist the court in determining whether bargaining power is equal or not [17].

However, the distinction between the different types of contracts on an attitudinal level can still be justified on other grounds:

- In the case of goodwill restraints the covenantor consents to a restriction the direct implications of which he can see. In post-employment cases the restraint is mostly concluded long before the restraint comes into effect. The restricted party often has no way of really foreseeing the situation in which he will have to refrain from engaging in certain activities of work. [18].
- In sale of goodwill cases the restriction will be in focus. In employment cases a restraint is not a direct and immediate result of the contract but a remote contingency that will only come into effect at some future date [19]. The consent of an employee cannot carry the same weight as a seller's in a sale of goodwill case even if it is accepted that the parties are on an equal footing [20].
- The role which exchange will play will differ. The restriction in a sale of goodwill will be more closely related to direct payment of a consideration [21] (although consideration will play an important separate role in determining the attitude of the court towards the restraint [22]).
- Post-employment restrictions will have a wider impact on freedom of work because they will also increase the power that the employer has over the employee during employment. It severely limits the ability of the employee to find work if employment is terminated [23].

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17. Basson v Chilwan 1993 (3) SA 742 (A) 763; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 442 and the reference to Basson; Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 404 see the criticism infra.

18. Stenhouse Australia Ltd v Phillips [1974] AC 391 at 401, Schacklock Phillips-Page (Pvt) Ltd v Johnson 1977 (1) SA 321 (RA) 326 although the argument was not used as a basis for distinguishing the different types of restraint.

19. Heydon 82, 83 and the discussion of Nordenfelt 536 although he did not clearly discern it.

20. Woolman 254 is too narrow.

21. Heydon 83 with reference to Herbert Morris 688 at 701 and 709; See Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453, Attwood v Lamont [1920] 3 KB 571 at 590 it was inherent in the arguments; Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 90; See also Heydon 186; Cheshire Fifoot and Furmston 400; Blake 648; Malden Timber Ltd v McLeish 1992 SLT 727 at 730 accepted in Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1157 read with 1160.

22. Davies 491 although too much emphasis was more generally placed on this issue; Infra 9.1.

- Past experience with such clauses will make courts more benevolent towards sale of goodwill restraints. Wider interests can be protected here and these restraints, accordingly, have a better chance of succeeding.

The attitudinal distinction between the two most important types of restraints represents an example of how practical experience will translate into principles and rules in restraint of trade cases. Not all the above mentioned factors will be prevalent in every case, but on the whole an attitudinal distinction between the two can be justified by these factors. The court should be prepared to investigate the reasons for distinguishing between the different types of restraints on an attitudinal level; however, judges can generally assume that they should be more strict in post-employment cases. Didcott J in *Roffey* therefore also should not be interpreted as excluding the attitudinal distinction between the different types of restraints merely because bargaining power cannot form the basis of such distinction [24]. The judge concerned himself with a narrower problem regarding the connection between bargaining power and the different types of restraints.

3. Attitudes towards partnerships

The attitude of the courts towards post-partnership restraints relative to the two other types of restrictions cannot be consistent because partnerships are not a homogeneous group of contracts [25]. The attitude of the courts will be influenced in most cases by resemblance either to sale of business or to post-employment restraints. However, a partnership restraint will seldom be exactly like any of the other types of restraints, and this will have to be accommodated. The courts will have to look at the facts of a case and determine the extent to which the factors determining attitude in other cases are relevant here.

Some factors will cause reluctance to enforce a restraint even if that restraint closely resembles a sale of business restraint:

- Post-employment restrictions are more strictly dealt with because they are concluded at a time when it is not really possible to foresee the circumstances in which the restraint will come into operation. This factor is also frequently prevalent in partnership restraints. Hence in

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[23]. M & S Drapers v Reynolds [1956] 3 All ER 814 at 820; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 11, 25, 31-32; Cheshire Fifoot and Furmston 400; Heydon 84; Gloag 572 a restraint could not merely be concluded to make it difficult for the covenantor to find employment; Walker 187.

[24]. Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 499 and supra Ch 7.1.1.

[25]. Supra Ch 7.2.

Spink [26] the court stated that it would have preferred to treat the restraint like a partnership restraint *concluded at the end of the partnership*.

- In partnership cases exchange for goodwill will sometimes not be at the core of the agreement even if it matches a sale of business [27]. In such cases the court should compensate for such differences.

4. Acceptance of reasonableness clauses

The parties sometimes add a term to their contract wherein they acknowledge that the restraint is reasonable or include an acceptance that a particular requirement for reasonableness will be met. Reaction to these clauses has been mixed.

In Scotland Lord Dervaird in *Hinton & Higgs* [28] tentatively decided that such clauses were ineffective because they constituted an attempt to oust the jurisdiction of the courts. But he went too far. There may be acknowledgement clauses that fall foul of his criticism but they, generally, are merely intended by the parties to be indicative of the way in which they saw a particular factual situation at conclusion of the contract.

In South Africa the courts have taken some notice of such clauses [29]. They are often added to a contract where the covenantor is not in an equal bargaining position, and in such cases the court should ignore them. However, courts should consider acknowledgement clauses between equal parties who realise what the effect of a restraint will be. They should at least have an attitudinal impact in cases where parties are in a relatively equal bargaining position [30].

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[26]. Spink (Bournemouth) Ltd v Spink [1936] Ch 544 at 548 although the court here probably over-estimated the importance of this factor, See the criticism supra Ch 7.2.3.

[27]. Bridge v Deacons [1984] AC 705 at 718.

[28]. Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450, MacQueen 343; See also counsel Dallas McMillan & Sinclair v Simpson 1989 SLT 454 at 456 although the court did not discuss it.

[29]. U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 147; See Kemp Sacs & Nell Real Estate (Pty) Ltd v Soll 1986 (1) 673 (O) 688 the court found it unnecessary to determine the weight that should be attached to this; Magna Alloys 905, See the criticism Lubbe and Murray 257-258, Schoombee 142 and 150; Book v Davidson 1989 (1) SA 638 (ZS) 650; Basson v Chilwan 1993 (3) SA 742 (A) 767-768 with reference to Magna Alloys 488, See Rautenbach & Reinecke 555.

[30]. Roffey v Catterall Edwards and Goudre 1977 (4) SA 494 (N) 499, But see the questions Lubbe and Murray 257-258; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 404-405; See BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 57 on the role of a later acceptance; Christie 441; Cf the courts in David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 434 and see *Annual Survey* (1984) 130, Bonnet v Schofield 1989 (2) SA 156 (D) 160 and Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488 were too careful, David Wuhl 435 was also wrong in saying that such clauses will always carry less weight in employment cases as bargaining power is unequal.

It is however, ironic that these clauses will probably play a theoretically more limited role in South African law after *Magna Alloys*. The new approach to the time at which reasonableness should be determined will diminish the weight that can be attached to an acknowledgement clause where the foreseeable circumstances when the restraint is concluded differ from the actual circumstances when the court is asked to enforce the restraint [31].

5. Systemic undercurrents and their influence on the reasonableness test

The general preference of a legal system may play an attitudinal role. There are several cases that have been decided one way or the other with stress on either the principle of sanctity of contract [32], or freedom of trade. It is dangerous to generalise, as decisions will also depend on their peculiar facts and as priorities may change [33]. Yet, there are general preferences that pervade the different legal systems.

In England freedom of trade has the strongest historical and systemic roots [34]. Sanctity of contract reached its apotheosis in the 19th century and during this period restraints of trade were often strictly enforced. However, this did not last for long.

In South Africa a different road has been taken [35]. Botha JA in *Basson* [36] contended that the preference for the underlying principle of freedom of contract has no relevance beyond determining onus. However, priorities will play an important attitudinal role. The broad preference of a legal system is very general and will often be overridden by more specific factors in a particular case. But the general priority of principles will still be of some relevance [37].

It is difficult to discern any general trends from the Scottish cases. In 1985 Woolman found apparent partiality for the enforcement of restraints in Scotland [38]. However, his general view is

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31. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488.
32. See e.g. Middleton v Brown (1878) 47 LJCh 411 at 412; Continental Tyre and Rubber (Great Britain) Co Ltd v Heath (1913) 29 TLR 308 at 310; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453; Federal Insurance Corp of SA Ltd v Van Almelo (1908) 25 SC 940 at 945.
33. Attwood v Lamont [1920] 3 KB 571 581-582; Gooderson 414.
34. Office Overload Ltd v Gunn [1977] FSR 39 at 43; Collinge 410.
35. Roffey v Catterall Edwards and Goudre (Pty) Ltd 1977 (4) SA 494 (N) 504-505; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 317; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 506, Domanski 241; Basson v Chilwan 1993 (3) SA 742 (A) 762 although no clear preference was expressed; Lubbe and Murray 255 doubted whether the courts properly discussed this issue; Schoombee 130, Cf 139-140 was also critical of the courts; Nathan 36.
36. Basson v Chilwan 1993 (3) SA 742 (A) 776-777.
37. Supra Ch 2, Ch 5, Ch 6.
38. Woolman 253, 257-258.

now open to doubt [39]. More recent cases again lean the other way. There is a need for a clearer expression of priorities [40]. It has sometimes been asked whether Scots law differs from English law [41]. No clear answer has been given to the question. But differences, if they exist at all, will more probably apply on this level. Scots lawyers in their weighing of priorities may look at South African law, as the two systems have considerable common points at their conceptual roots.

6. Reasonableness in the interest of the covenantor

It has been oft stated that the position of both the covenantor and the covenantee should be considered [42] in determining the reasonableness of a restraint. This has been taken more seriously in some of the South African and Scottish cases [43]. But the authorities frequently only pay lip service to the interests of the covenantor [44]. It has been argued that a restraint will also be in the interests of the covenantor if it does no more than reasonably protect the legitimate interests of the covenantee [45].

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[39]. MacQueen 345 suggests that the position had changed in Scotland; Infra Ch 11.5.1.

[40]. Woolman 253; See the general criticism of Forte 23; Cf the appeal for expression of principles Du Plessis and Davis 102.

[41]. Cf Stewart v Stewart (1899) 1 F 1158 at 1159 and the argument of counsel but the point was not taken up by the court, See Christie *Jur Rev* 294; See supra Ch 3.3 and Ch 2.4.2.1.

[42]. Cf Croft v Hawe (1836) Donnely 82 the restraint was "harsh and oppressive" and not appropriate in the case. The court did not elaborate on this, Cf however Heydon 119 is not acceptable; Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 77; Herbert Morris 700 with reference to Leather Cloth Co v Lorsont (1869) LR 9 Eq 345 at 353, 707; Millers Ltd v Steedman (1915) 31 TLR 413 at 416; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394 quoting Herbert Morris 707; Attwood v Lamont [1920] 3 KB 571 at 589 and the answer to Henry Leetham supra; Fitch v Dewes [1921] 2 AC 158 at 163; Dickson v Jones [1939] 3 All ER 182 at 187; M & S Drapers v Reynolds [1956] 3 All ER 814 at 816; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 241; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1372; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 343; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1228, 1232; Anson 323; Chitty 1203; Farwell 69; Heydon 84, 265-266 although this is confusing because the author tried to develop a unitary test for all restraints; Winfield (1946) 319-320; Wilberforce 209; Blake 649ff; Gloag 570; Walker 185; Gordon v Van Blerk 1927 TPD 770 at 773; New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 82; Lewin v Sanders 1937 SR 147 at 153; Katz v Efthimiou 1948 (4) SA 603 (O) 613 with reference to Fitch; Schwartz v Subel 1948 (2) SA 983 (O) 987 with reference to New United Yeast; Filmer v Van Straaten 1965 (2) SA 575 (W) 578; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 2; Ex Parte Spring 1951 (3) SA 475 (C) 478, 479; Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W) 309; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 245; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258.

[43]. See the balance of convenience test in Scotland infra Ch 15.2.2; Gordon v Van Blerk 1927 TPD 770 at 774-775; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 4; Basson v Chilwan 1993 (3) SA 742 (A) 767 discussed infra.

[44]. Eastes v Russ [1914] 1 Ch 468 at 486-487; Fitch v Dewes [1921] 2 AC 158 at 163.

[45]. Herbert Morris 707-708, See the reference in Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1228 at 1232; Anson 323; Chitty 1203 who thought that wider reasonableness issues will be dealt with in terms of the public interest leg of the test for legality of the restraint but that is unacceptable infra Ch 10; New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 82.

Some authorities have even averred that a restraint of trade will be effective if it can merely be shown that the legitimate interests of the *covenantee* have been reasonably protected in post-employment and sale of goodwill cases [46]. In *Allied Dunbar* [47] Millett J criticised "the concept of proportionality", i.e. the concept that the interests of the parties can truly be balanced, on the basis that it was "a novel and dangerous doctrine".

Yet there are many specific aspects regarding reasonableness towards the covenantor that have been considered by the courts. Heydon [48] contended "if the courts are prepared to ask whether a restraint exceeds that needed to protect certain interests, why can not they ask whether a restraint unduly infringes the liberty of the covenantor", and there is a superficial logic to this argument. But the interests of the covenantee and covenantor play different roles within restraint of trade relations.

In *Recycling* [49] the court accepted that a restraint which protects a legitimate interest will only be enforced if it is otherwise fair between the parties. However, these issues will not be extrinsic and fundamental standards in the same manner as the interests of the covenantee. They will be thrown in the balance with the broader test that emphasises certain interests of the covenantee. None of the cases have rocked the traditional emphasis on interests of the covenantee. The one exception is restraints that may come into effect on breach by the covenantee, but this issue is in many respects exceptional [50].

7. Inequality or equality of bargaining power

Strong precedent for at least giving some weight to the equality or inequality of bargaining power exists in all three legal systems under discussion [51]. But it is difficult to determine exactly what role this factor should play [52].

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46. Henry Leetham & Sons Ltd v Johnstone White [1907] 1 Ch 189 at 194; Heydon 199 with reference to Leighton v Wales (1838) 3 M & W 545, Heydon 265-266 although he was critical of the approach; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 363; Du Plessis and Davis 93 and 97; Schoombee 141 - with reference to Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 73 put this forward as the view that was taken in English law and in South Africa before Magna Alloys.
47. Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 65.
48. Heydon 167.
49. Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258.
50. Infra 11.2ff.
51. Heydon *McGill* 342; Woolman 258; Cf A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299 counsel emphasised inequality but it was not discussed; Forman v Barnett 1941 WLD 54 at 62 stated that it would be legitimate to start with the equality issue; Basson v Chilwan 1993 (3) SA 742 (A) 777 Botha JA merely accepted that bargaining power will be one of a multitude of factors that will be relevant here; Christie 440-441; See supra 2, Ch 7.1.
52. Wedderburn 152 stated it is a practice and not a doctrine. But this is too narrow.

In *E Underwood* [53] Lindley MR was dismissive of equality of bargaining power arguments. He stated that inequality of bargaining power:

> "cannot be a ground for holding his bargain invalid, unless some unfair advantage is taken of his position; and, so long as his bargain is reasonable, having regard to the protection of the employer, it cannot be truly said that unfair advantage is taken of his position".

Yet bargaining power will also play an important role in actually establishing whether reasonableness exists. The two questions cannot be separated in this manner.

In *Drewtons* [54] Van den Heever J described bargaining power as irrelevant, and Tebutt J also had some problems with its investigation. However, the judges did not discuss all the contrary authorities and did not really justify their views. The submissions of Van den Heever J consist of generalisations about a shortage of skilled labour and are too abstract. The further criticism of the emphasis on bargaining power in the court a quo concerns other aspects of reasonableness towards the covenantor, and has nothing to do with bargaining power arguments. Her conclusion can only be explained against the concept of public policy which she attempted to develop [55], but that concept is also completely unacceptable. South African courts can now probably examine relative bargaining power to a greater extent than before. It was admitted in *Roffey* that bargaining power has a separate relevance, while the reasonableness question generally has been left more open in *Magna Alloys*.

Yet the authorities that hint at thrusting the notion of equality of bargaining power to centre stage as a touchstone for determining reasonableness of a restraint have been overridden by the multitude of cases that emphasise the interests of the covenantee. It is an over-simplification to say, as Bell did [56], that the restraint of trade doctrine in post-employment restraints must merely balance the bargaining power of the parties. Kerr definitely put it too strongly when he stated that equality of bargaining power would create an assumption of reasonableness [57]. It is not the acid test for determining the effectiveness of a restraint. The doctrine is based on protecting much wider public policy principles. The courts can never be bound completely by the parties'

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53. E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 306.
54. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313, 317.
55. Supra Ch 2.3.2.
56. Bell *Policy Arguments in Judicial Decisions* (1983) ch 4 and his central thesis.
57. Kerr 506-507; Cf also the unacceptable view of Scott Robinson 158.

assessment of reasonableness where they are in a position of equal bargaining because of the role which the public policy principle of freedom of work plays here [58].

Moreover, bargaining power does not directly determine the interests that are protectable [59]. Eksteen JA in *Basson* [60] decided that mere competition could be restricted once it is accepted that the parties are in a position of equal bargaining. But his view cannot be accepted:

- He relied on combination cases [61]. However, the reasons for the wider protection of interests in combination cases are more substantial, and it is overly simplistic to accept that mere competition was restricted in the cases where combination restrictions were regarded as reasonable.
- He placed too much emphasis on the role of bargaining power as a basis for distinguishing different types of classic restraints.

The other judges in the case did not take the same view of bargaining power [62].

In *George Michael* [63] Parker J submitted that courts will be reluctant to substitute their (objective) opinion for the (subjective) view of the parties. He then stated that the value of subjective views will however be reduced where bargaining was not equal, and suggested that it might even be reduced to nil where bargaining power is very unequal. However, this is not acceptable as a starting point. Courts have not been reluctant to interfere with contracts once it has been established that they are in restraint. Bargaining power may influence the court in both directions.

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58. Apparently Mason 741; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 11; Whitehill v Bradford [1952] 1 Ch 236 at 246; Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1299; See the criticism of Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 in the more acceptable Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 1 ALR 385 at 400-401 and 408-409, Queensland Co-operative Milling Association Ltd v Pamag (1973) ALR 47 at 53 and 59 discussed Heydon *McGill* 343; Treitel 409; Dallas McMillan & Sinclair v Simpson 1989 SLT 454 at 457; Woolman 257-258 merely combined inequality of bargaining power with other arguments; Forman v Barnett 1941 WLD 54 at 64; Katz v Efthimiou 1948 (4) SA 603 (O) 612; Kin v Sharnek 1959 (3) SA 534 (E) 537; Hermer v Fisher 1960 (2) SA 650 (T) 655; Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280 and the view of counsel; Wohlman v Buron 1970 (2) SA 760 (C) 763; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 73 although the court was cautious; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 359; Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 718-720; Van De Pol v Silbermann 1952 (2) SA 561 (A) 571-572; Weinberg v Mervis 1953 (3) SA 863 (C) 865, 867; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 106; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 66; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 505; Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 402; Christie 441 with reference to Van de Pol; See Du Plessis and Davis 94-95 but they again leant too far to the other side. It is wrong to say that equality of bargaining power influences reasonableness as a whole while consideration should determine the reasonableness of a restraint; Nathan 40-41; Schoombee 142 the test is objective; See on acknowledgement clauses supra 4.

59. Supra Ch 7.1.1 and the discussion of the distinction between post-employment and goodwill restraints.

60. Basson v Chilwan 1993 (3) SA 742 (A) 762-763.

61. English Hop Growers Ltd v Dering [1928] 2 KB 174, New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75.

62. See supra especially the express criticism Basson v Chilwan 1993 (3) SA 742 (A) 768 per Nienaber JA.

63. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 332.

assessment of reasonableness where they are in a position of equal bargaining because of the role which the public policy principle of freedom of work plays here [58].

Moreover, bargaining power does not directly determine the interests that are protectable [59]. Eksteen JA in *Basson* [60] decided that mere competition could be restricted once it is accepted that the parties are in a position of equal bargaining. But his view cannot be accepted:

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62. See supra especially the express criticism Basson v Chilwan 1993 (3) SA 742 (A) 768 per Nienaber JA.

63. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 332.

The passages from *Esso* relied upon by Parker J concern the jurisdictional rather than substantive question. They are not directly relevant here.

The restraint of trade doctrine aims at balancing freedom of trade and sanctity of contract. The principle of sanctity of contract will be enhanced where the parties are in a position of equal bargaining [64]. The court, when it has some leeway, will be influenced by bargaining power in determining the extent to which a covenantee may protect legitimate interests. It will be of attitudinal importance. The courts have often expressed their reluctance to find a restraint unreasonable where such a restraint has been concluded by parties who are on an equal footing or where the covenantor is in the stronger bargaining position [65]. Courts are slow to enforce restraints that are concluded by unequal parties [66].

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[64]. Blake 650; Gurry 206; Vermeulen v Smit 1946 TPD 219 at 222 referred to New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 84 where reference was in turn made to English Hop Growers Ltd v Dering [1928] 2 KB 174 at 180-181; Steyn v Malherbe 1967 (2) PH A.43 150 at 151-152.

[65]. See Mumford v Gething (1859) 7 CBNS 305 at 320, Benwell v Inns (1857) 24 Beav 307 at 311 although the factual question whether the covenantor really had choice in the matter was not discussed; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453; Tivoli Manchester Ltd v Colley (1904) 20 TLR 437 at 438; Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 365; Woodbridge & Sons v Bellamy [1911] 1 Ch 326 at 332; Herbert Morris Ltd v Saxelby [1915] 2 Ch 75 at 84-85 it will be some evidende although the court was very cautious of this, See also the criticism supra Ch 7.1; Fitch v Dewes [1921] 2 AC 158 at 162; Spink (Bournemouth) Ltd v Spink [1936] Ch 544 at 548; Gilford Motor Co Ltd v Horne [1933] 1 Ch 935 at 960; Whitehill v Bradford [1952] 1 Ch 236 at 243, 244, 246; M & S Drapers v Reynolds [1956] 3 All ER 814 at 820 and the discussion of Gilford; Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1299, 1301; Marion White Ltd v Francis [1972] 3 All ER 857 at 861; Bridge v Deacons [1984] AC 705 at 717 although the court then goes too far; George Silverman Ltd v Silverman (1969) 113 Sol Jo 563; Lindley 10-176 at 214 on the position in partnerships; Blake 661; Anthony v Rennie 1981 SLT (Notes) 11 at 12; WAC Ltd v Whillock 1990 SLT 213 at 217, See Scott Robinson 158; Cameron v Mathieson 1994 GWD 29-1740; African Theatres Trust Ltd v Johnson 1921 CPD 25 at 27; Vermeulen v Smit 1946 TPD 219 at 222 refers to New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 84 where reference was in turn made to English Hop Growers v Dering [1928] 2 KB 174 at 180-181; Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 718, See similarly Olds v Tollgate Holdings Ltd 1970 (4) SA 343 (T) 348; Van De Pol v Silbermann 1952 (2) SA 561 (A) 571-572; Weinberg v Mervis 1953 (3) SA 863 (C) 865-866 although the issue was awkwardly phrased, 867; Kin v Sharnek 1959 (3) SA 534 (E) 537; Hermer v Fisher 1960 (2) SA 650 (T) 655; Steyn v Malherbe 1967 (2) PH A.43 151-152 although perhaps too much emphasis is here placed on it; Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W) 310; Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280-281; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105, 106, 109-110; Wohlman v Buron 1970 (2) SA 760 (C) 762-763 with reference to Van de Pol; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 73-73; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 66; Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 346; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 359, Nathan 40-41; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258; Basson v Chilwan 1993 (3) SA 742 (A), 762-763; Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 513 but see the criticism infra 7.1; Kerr 506; Nathan 40-41.

[66]. Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 771-772 and the argument that the persuasive power of freedom of contract arguments may sometimes be diminished, Express Dairy Co Ltd v Jackson (1930) 46 TLR 147 at 148. See the discussion of these cases Christie *Encyclopaedia* 587-588; M & S Drapers v Reynolds [1956] 3 All ER 814 at 820; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13 the case was distinguished from Gilford on the basis that the covenantor there was a director, See M & S Drapers. See supra for another explanation; Anthony v Rennie 1981 SLT (Notes) 11 at 12 the judge took a different view on the facts but it seems he would have been prepared to look at inequality if it existed; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W)

7.1. The facts that the courts will look at in determining bargaining position

One of the biggest criticisms against investigating equality of bargaining power in restraint of trade cases has always been that it produces difficult problems of proof. However, these problems can be overcome.

- The courts should only consider bargaining power where it is either substantially equal or unequal. This is much easier to determine, and there will probably be greater consensus in extreme cases [67].
- If equality of bargaining power is attitudinal, the degree of equality or inequality can, to a much greater extent, impact on the extent to which it will influence reasonableness.

Equality of bargaining power can be fathomed by looking at the contract emerging from the bargaining [68]. Thus in *Anthony* [69] the court considered that a partnership agreement bound all partners equally, which will give at least some indication of equality of bargaining. A court may compare the actual terms concluded with the terms that parties would have concluded if they were in a position of equal bargaining power [70]. This test will only be workable as long as the courts merely attempt to determine clear equality or clear inequality, and the circumstances in which the restraint is concluded will probably be more important [71].

The reasons for the conclusion of the contract should be one of the important factors which courts should consider [72]. Judges can examine the urgency with which the contract was concluded. South African courts previously refused to consider that one of the parties was in a position of great urgency [73]. However, these matters should now be open for investigation. In *Coin* [74] the court considered that the covenantor was in a ghastly financial position, although it nevertheless

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359; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 402-403 showed sympathy for argument of counsel although it took a different view of the facts; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 332; Nathan 40-41; Schoombee 142.

67. Bargaining power should be neutral in a case like Savage and Pugh v Knox 1955 (3) SA 149 (N) it seems that this is approximately how the court saw it at 156.

68. Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 158, 162-163.

69. Anthony v Rennie 1981 (Notes) 11 at 12; See also supra Ch 7.2.1.

70. Kerr 507 and the discussion of Malan v Van Jaarsveld 1972 (2) SA 243 (C); Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 403.

71. Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 235 and the categorisation; See also the facts in Cramond (Cash Register Terminals) Ltd v Reynolds 1988 GWD 8-310 enough details are not given but circumstances like these might be relevant in determining inequality.

72. Kerr 507; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 306 although the case is probably too narrow today; On urgency see also Stewart v Stewart (1899) 1 F 1158 at 1167.

73. Van de Pol v Silbermann 1952 (2) SA 561 (A) 572; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 250.

74. Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 569.

regarded this as inconclusive. Spoelstra J contended that this will only be relevant if the covenantee also knew of it. However, it is possible that the covenantor can bargain from a weak position even though the covenantee was oblivious of his situation. The covenantee's knowledge should not be relevant. The view of Spoelstra J presupposes some abuse by the covenantee, but this is unnecessary. On the other hand the court should not accept urgency too easily. In *Humphrys* [75] an important employee concluded a restraint with the buyers of a business in which he worked. The court maintained that the parties were in a position of unequal bargaining because the appellant was dependent on keeping his job. But the employee was fundamentally important to the success of the business purchased and that should have been an important balancing factor. At best for the covenantor the bargaining power should have been a neutral issue [76].

The existence and feasibility of alternatives will influence bargaining power. It might be asked whether the covenantor could have gained other employment [77], and whether other terms could have been concluded in the particular contract [78]. In *Cansa* [79] it was suggested by counsel that the contract was standard and did not provide the employee with any alternatives. Vos J considered that the covenantor could in the same circumstances take up employment with another employer if he did not want to be bound by the restraint. However, the whole issue was determined superficially and in abstracto. The alternatives-argument can only succeed where there is a demand for the skills of the covenantor, but the court did not really investigate this. In *Recycling Industries* [80] it was accepted that the employee had to take it or leave it, and this weighed heavily with the court. Blake [81] stressed the extent to which parties are allowed to tamper with a form contract. In *Drewtons* [82] the court a quo considered that the covenantor had no opportunity to influence the terms of the agreement. This approach was criticised on appeal by Van den Heever J, but her criticism is unacceptable [83]. Yet this issue might sometimes have the contrary effect on the attitude of the court. Judges will be critical of covenantors where other evidence shows the parties to be in

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75. Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 404 the court here placed too much emphasis on the fact that the covenantor was an employee, Cf the different view in M & S Drapers supra 7.
76. See the court a quo in Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 404. The criticism on appeal cannot be accepted.
77. Mumford v Gething (1859) 7 CBNS 305 at 320 although it is doubtful whether the actual fact can be considered; Blake 650; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 359; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 403.
78. Marion White Ltd v Francis [1972] 3 All ER 857 at 861; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 359; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 109-110; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 403.
79. Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 66-67.
80. Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258.
81. Blake 650.
82. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313.
83. Supra 7.

a position of equal bargaining. In such cases agreements will weigh even more heavily with courts because the covenantor should have realised the seriousness of the restraint [84].

Judges may ask whether a restraint clause was actually evaluated thoroughly by the parties [85]. The court will look at the knowledge and skill which the different parties had in bargaining for terms in the contract [86]. Whether the covenantor had legal or other independent advice, or whether the covenantor has legal knowledge, will be considered [87].

It might be relevant to look at the class of contract in which the restraint falls. However, this aspect must not be over-emphasised; courts must not fall back on the rigid approach of old. This is only one of many aspects that should weigh with them [88].

8. Restraints in English law and the doctrine of valuable consideration [89]

In England restraints of trade will only be subject to the normal rules regarding valuable consideration [90]. Only minimal sufficient consideration will now be required [91]. The courts initially

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[84]. Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 513 although the court did not properly investigate whether the parties would otherwise be in a position of equal bargaining; Cf also Tivoli Manchester Ltd v Colley (1904) 20 TLR 437 at 438.

[85]. Middleton v Brown 47 (1887) LJCh 413; Nicoll v Beere (1885) 53 LT 659 at 660; Stuart and Simpson v Halstead (1911) 55 Sol Jo 598 it was accepted that the covenantor understood the agreement but it was not weighed in with reasonableness issues; Cf Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 238 the fact that a document was taken away and read will only play a role when the question is whether the covenantor was cheated. But it is submitted that it may also be relevant here; Cf also Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 446 where it was noted that a copy was given to the covenantor and that it was read and understood but it was also not taken into account in the determination of reasonableness.

[86]. Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 771-772, Express Dairy Co Ltd v Jackson (1930) 46 TLR 147 at 148; Whitehill v Bradford [1952] 1 Ch 236 at 243, 246; Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1301; Marion White Ltd v Francis [1972] 3 All ER 857 at 861; Blake 661; Wilkinson v Wiggill 1939 NPD 4 at 14; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 332; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 258.

[87]. Woodbridge & Sons v Bellamy [1911] 1 Ch 326 at 332; Fitch v Dewes [1921] 2 AC 158 at 162; Whitehill v Bradford [1952] 1 Ch 236 at 246; Cf Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 238 and the criticism supra; Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1301; Bridge v Deacons [1984] AC 705 at 717; Cf Anthony v Rennie 1981 SLT (Notes) 11 at 12 where the court considered that the contract by which a person was accepted as a partner was drawn up by the partnership solicitor. Here it was not accepted as a reason for regarding the relationship as unequal but there might be cases where it will have that effect; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 109-110; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 434; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 380 it might even be relevant that the covenantor was given the opportunity to obtain advice.

[88]. Anthony v Rennie 1981 (Notes) 11 at 12 see the submissions of counsel although the court did not accept it on the facts; See Supra 2 this issue must be approached with care.

[89]. British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 570 on the impact of failure of consideration on remedies; Rousillon v Rousillon (1880) 14 ChD 351 at 363 where reference was made to consideration arguments but it was not taken further.

demanded adequacy [92], but they decided that it would be too problematic to weigh up the obligations of each party in every case [93]. They emphasised freedom of contract and the principle that parties are the best judges of their own interests [94]. Heydon [95] argued that adequate consideration should, for the doctrine of valuable consideration, be required in restraint of trade cases. However, the marrying of these issues has led to unnecessary rigidity. There will only be one possible exception to the normal application of the doctrine of consideration in restraint of trade cases. It might also apply where a restraint of trade is contained in a contract under seal (although there is no clear authority for this point) [96].

9. Adequacy of consideration and reasonableness inter partes in the three legal systems

Some of the cases that rejected the requirement of adequate consideration went very far [97], and the courts have sometimes been critical of the role of consideration [98]. But adequate consideration will

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[90]. Hitchcock v Coker (1837) 6 Ad & E 438 at 456-457; Archer v Marsh (1837) 6 Ad & El 959 at 967; Leighton v Wales (1838) 3 M & W 545 at 551; Hutton v Parker (1839) 7 Dowl 739; Pilkington v Scott (1845) 15 M & W 657 at 660; Sainter v Ferguson (1849) 7 CB 716; Tallis v Tallis (1853) 1 E & B 391 at 410; Green v Price (1845) 13 M & W 695 at 698; Benwell v Inns (1857) 24 Beav 307 at 311; Clarkson v Edge (1863) 33 Beav 227 at 230; Gravely v Barnard (1874) LR 18 Eq 518; Collins v Locke (1879) 4 App Cas 674 at 686; Buxton and High Peak Publishing and General Printing Co v Mitchell (1885) Cab & El 527; Davies v Davies (1887) 36 ChD 359 at 365-366, 381, 397; Middleton v Brown (1878) 47 LJCh 411 at 413; Nordenfelt 565; Phillips v Stevens (1899) 15 TLR 325 and the discussion of Young v Timmins infra by counsel; Howard v Danner (1901) 17 TLR 548; Tivoli Manchester Ltd v Colley (1904) 20 TLR 437 at 438; Attwood v Lamont [1920] 3 KB 571 at 589; Kales 196; Blake 639ff; Winfield (1946) 325; Christie *Jur Rev* 293; Heydon 167 argued for a more active determination of consideration but see infra 10.

[91]. Hitchcock v Coker (1837) 6 Ad & E 438 at 453; Ward v Byrne (1839) 5 M & W 548 at 559 but see the criticism of the case infra; Gravely v Barnard (1874) LR 18 Eq 518; Sainter v Ferguson (1849) 7 CB 716; Benwell v Inns (1857) 24 Beav 307; Mumford v Gething (1859) 7 CBNS 305 at 318, 323, 326-327; Middleton v Brown (1878) 47 LJCh 411 at 413; Hood and Moore's Store Ltd v Jones (1899) 81 LT 169; Howard v Danner (1901) 17 TLR 548; Woodbridge & Sons v Bellamy [1911] 1 Ch 326 at 332-333; Jenkins v Reid [1948] 1 All ER 471 at 480; Luck v Davenport-Smith [1977] EG 73 at 84; Marshall v NM Financial [1995] 1 WLR 1461; Heydon 165; Treitel 402; Notes (1929) 29 *Columbia Law Review* 347 at 348ff see especially 349.

[92]. Mitchel v Reynolds (1711) 1 PWms 181 at 186; Chesman v Nainby (1727) 2 Str 739 at 744; Davis v Mason (1793) 5 Term Rep 118; Gale v Reed (1806) 8 East 80; Shackle v Baker (1808) 2 Ves Supp 379; Homer v Ashford and Ainsworth (1825) 3 Bing 322; Horner v Graves (1831) 7 Bing 735 although there are also statements to the contrary in this case see Heydon 21; Young v Timmins (1831) 1 Cr & J 331, See Esso 294 the court accepted that the conclusion was correct although the grounds would not apply anymore, Nel v Drilec (Pty) Ltd 1976 (3) SA 79 (D) 84 accepted that the ratio would not apply in South Africa; Keppell v Bailey (1834) 2 My & K 517 at 530; Chitty 1190; Trebilcock 10-12, 21; See Wilberforce 208 and the discussion of the newer types of restraints.

[93]. Hitchcock v Coker (1837) 6 Ad & E 438 at 457; Middleton v Brown (1878) 47 LJCh 411 at 413.

[94]. Archer v Marsh (1837) 6 Ad & El 959; Trebilcock 21ff.

[95]. Heydon 164 and 167ff.

[96]. Mitchel v Reynolds (1711) 1 PWms 181 at 193; Homer v Ashford and Ainsworth (1825) 3 Bing 322; Mallan v May (1843) 11 M & W 653 at 665; Gravely v Barnard (1874) LR 18 Eq 518; Heydon 165; Chitty 1194; Christie *Jur Rev* 293.

[97]. Hitchcock v Coker (1837) 6 Ad & E 438 453, 457-458; Archer v March (1837) 6 Ad & El 959; Sainter v Ferguson (1849) 7 CB 716 at 729; Mouchel v William Cubitt & Co (1907) 24 RPC 194 at 201.

still have a considerable role to play in the determination of reasonableness [99], and this role of consideration must be clearly distinguished from its role within the doctrine of valuable consideration [100].

Despite contrary dicta [101], the doctrine of valuable consideration has not been accepted in South Africa and Scotland, and it can have no separate relevance in restraint of trade cases. Arguments in English law to the effect that only minimal consideration will be required to satisfy the doctrine of consideration are therefore irrelevant in these legal systems. But the question of adequacy of consideration is still important in these systems. The question of consideration has not merely been tied to the doctrine of valuable consideration, and there is no reason why consideration cannot be relevant in determining reasonableness in South Africa and Scotland [102].

Hence the courts have considered consideration in many situations:

- In *Bridge v Deacons* it was regarded as significant that all partners to a certain partnership were subject to the same restraint [103], and the court went to some trouble to explain why the restraint was reasonable although minimal direct consideration was paid [104].
- The courts have sometimes looked at the quantum of indirect rewards which the covenantor has received in exchange for accepting the restraint when determining whether the restraint is reasonable [105].

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[98]. Herbert Morris 707; Fitch v Dewes [1921] 2 AC 158 at 169, See the reference Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 394; M & S Drapers v Reynolds [1956] 3 All ER 814 at 816.

[99]. Ward v Byrne (1839) 5 M & W 548 at 559 took an incorrect view on how this would take place; Nordenfelt 565; Attwood v Lamont [1920] 3 KB 571 at 589 where the court still quoted Herbert Morris 707 but Younger LJ placed a narrow interpretation on it; Office Overload Ltd v Gunn [1977] FSR 39 at 43; Bridge v Deacons [1984] AC 705 at 717-718; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 329-330; Anson 324; Chitty 1195; Treitel 401; Trebilcock 21, 69 is too open and shut; Wilberforce 208; AL Corbin *Corbin on Contracts* para 1395.

[100]. Supra 9 and the reference to Heydon where this was not done.

[101]. Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1112, and probably also 1115; Stewart v Stewart (1899) 1 F 1158 at 1163, 1169 left the question open, See the answer Christie *Jur Rev* 293 cannot be accepted; Christie *Encyclopaedia* 589; Edgcombe v Hodgson (1902) 19 SC 224 at 226; SA Breweries v Muriel (1905) NLR 362 at 366-367 cannot be accepted.

[102]. Gloag 572-573, Katz v Efthimiou 1948 (4) SA 603 (O) 612 cannot be accepted.

[103]. Bridge v Deacons [1984] 1 AC 705 at 716 and see the Australian case of Geraghty v Minter (1979) 142 CLR 177 at 198; Lindley 10-181; Hensman v Trail The Times Oct 22 1980 which Lindley called a severe case (not overruled on this point in Kerr v Morris [1987] Ch 90), Atiyah 341 placed too much emphasis on this; Anthony v Rennie 1981 (Notes) 11 at 12; Woolman 257; Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) 171 the court in Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280-281.

[104]. Bridge v Deacons [1984] 1 AC 705 at 718.

[105]. Horner v Graves (1831) 7 Bing 735 at 742-743 similar factors will today play a role in determining reasonableness; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453 and see the Canadian case of Mills v Gill [1951] 3 DLR 27 (Ont HC); Howard v Danner (1901) 17 TLR 548 at 548-549 although the court took a too narrow view of consideration, See Heydon 167; Eastes v Russ [1914] 1 Ch 468 at 487; Pellow v Ivey (1933) 49 TLR 422 at 423 although it is not clear exactly how the court considered this issue;

- It has been accepted that the reasonableness of a restraint will be promoted if the covenantor received considerable direct rewards, in the form of remuneration, for being subject to the restraint [106].
- The duration of the employment which the covenantor receives in exchange for the restraint may be of importance [107]. There is only pre-*Magna Alloys* authority on this point in South Africa. But it will be straightforward now. The actual duration of the contract [108] may be considered as one of the factors that will influence the reasonableness of the restraint. It is suggested that courts should in future investigate it. The position in the other legal systems and in pre-*Magna Alloys* South African law does, however, produce nice problems. The courts are only allowed to look at the *possible* minimum duration as viewed from the moment of conclusion. Indiciae are scarce but it might be important to look at the duration of notice. Some courts simply ignored short notice [109]. In other cases very short notice was regarded as sufficient for satisfying the doctrine of consideration and the issue was then left at that; duration was not considered for the purpose of reasonableness [110]. And in yet further cases judges doubted the importance of duration of notice for the purpose of reasonableness [111]. But there are more acceptable authorities where support can be found for the notion that the length of notice should be considered within the reasonableness test

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Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1115 but see the criticism supra; Schwartz v Subel 1948 (2) SA 983 (O) 989, Malan v Van Jaarsveld 1972 (2) SA 243 (C) 250; Although it is not clear what effect it had on the decision the court in David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 434; Cf Louisiana law as discussed by Hines 608ff and especially 616.

106. Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 453; Spink (Bournemouth) Ltd v Spink [1936] Ch 544 at 548; Marchon Products Ltd v Thornes (1954) 71 RPC 445 at 448-449; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 241; Heydon 168; Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248, McBryde 595; Living Design (Home Improvements) Ltd v Davidson [1994] IRLR 69 the submission of counsel was not discussed; Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1115; Woolman 255; Schoombee 141.

107. Heydon 168-169; Cf also the comparisons of Woolman 255 of A & D Bedrooms Ltd v Michael 1984 SLT 297, Bluebell Apparel Ltd v Dickinson 1978 SC 16; Cf the position in Louisiana law as discussed by Hines 608ff.

108. See also supra Ch 6.7; Heydon 169 also preferred this approach.

109. Proctor v Sargent (1840) 2 Man & G 20; Sainter v Ferguson (1849) 7 CB 716; Benwell v Inns (1857) 24 Beav 307; Cornwall v Hawkins (1872) 41 LJCh 435; Nicoll v Beere (1885) 53 LT 659; Fellows v Woods (1888) 59 LT 513; Phillips v Stevens (1899) 15 TLR 325; Howard v Danner (1901) 17 TLR 548; Heydon 168.

110. Leighton v Wales (1838) 3 M & W 545 at 551; Jacoby v Whitmore (1883) 49 LT 335; Middleton v Brown (1878) 47 LJCh 411 at 413 although the court here looked at the fact that the contract had gone on for a year; Gravely v Barnard (1874) LR 18 Eq 518 at 522 with reference to Davis v Mason 5 TR 118 and 120.

111. Evans v Ware [1892] 3 Ch 502 at 504 but the court did not see it as a general rule. It was accepted that it was a "fair point" to argue that a restraint was unreasonable on this basis; M & S Drapers v Reynolds [1956] 3 All ER 814 at 816 on the basis that adequacy of consideration was not relevant with reference to Herbert Morris; See Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1232, 1235 where a decision on whether this issue was relevant was avoided. Cf Cross LJ accepted that the issue might never be relevant; See also Francis Delzene Ltd v Klee (1968) 112 Sol Jo 583 "There was no authority for the proposition that there must be a mathematical correlation between the length of notice ... and the time for which the restraint was to be operative".

[112]. Yet the duration of notice should not be conclusive. The court must look at all the circumstances of the case and determine the likely length of the contract [113]. It will for instance be of importance that the employment had already run for some time when the restraint was concluded [114]. The court must consider whether the covenantor will at least probably be ensured of a proper term of employment in exchange for binding himself into a restraint of trade, and the duration of notice will probably only play a limited role in this regard [115].

Heydon [116] mentioned that the courts will look at the fact that the covenantor otherwise would not have been able to conclude a contract of employment as an aspect regarding adequacy of consideration. However, it cannot be a very important matter in the determination of reasonableness. The authorities on which he relies are not germane [117]. This factor will be fundamental in determining whether there is sufficient consideration in terms of the doctrine of consideration, but it will be unimportant in determining reasonableness [118].

9.1. The impact of adequacy or inadequacy on the question of reasonableness

Since *Hitchcock* [119], the courts have not simply invalidated contracts where there is no adequate consideration. However, there are many examples of cases where adequacy of consideration has played a role in determining reasonableness. This factor will probably help to lay down the attitude to the restraint. Where there is adequate consideration, courts will be more benevolent towards protecting the covenantee. However, where adequate consideration is lacking the courts will meticulously ensure that only clear legitimate interests are protected [120].

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[112]. E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 314; Eastes v Russ [1914] 1 Ch 468 at 476; Mason 741; Fellowes & Son v Fisher [1976] 1 QB 122 at 129; Heydon 165, 168 and especially 169; Cf Heydon *McGill* 343; Remington Typewriter Co v Sim (1915) 1 SLT 168 at 170 although it is not clear whether the court considered it with consideration in mind, See also Ch 6.7; Estate Matthews v Redelinghuys 1927 WLD 307 at 312.

[113]. Heydon 136; See also supra Ch 6.7; Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 70; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 501.

[114]. Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1232, 1235, M & S Drapers v Reynolds [1956] 3 All ER 814 at 820, Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) 69.

[115]. Cf Putsman v Taylor [1927] 1 KB 637 at 643 where the court stressed that the duration of employment will only be important in so far as it has been contemplated at conclusion; See also infra 11.4.

[116]. Heydon 167.

[117]. Howard v Danner (1901) 17 TLR 548 contains no statement to this effect, Tivoli Manchester Ltd v Colley (1904) 20 TLR 437 at 438 made some tentative points on this issue.

[118]. See supra 9.

[119]. Hitchcock v Coker (1837) 6 Ad & E 438.

[120]. Attwood v Lamont [1920] 3 KB 571 at 589 can possibly be so interpreted; Christie *Encyclopaedia* 589, See also infra Ch 11.5.3; Notes (1929) 29 *Columbia Law Review* 347 at 348-349 is unacceptable; Cf Treitel 409-410.

In *George Michael* [121] Parker J accepted that consideration will be relevant in determining reasonableness inter partes. Yet he over-estimated the importance of this factor. He accepted that "there are some types of restraint which will be unenforceable no matter how large the consideration for them". But he stated that buying off competition would be acceptable if the consideration makes it reasonable. This is unacceptable, and the authorities relied on do not support it. This view can only be explained on the ground that the court was not dealing with a traditional restraint (although it clearly attempted to make a general point).

In *JA Mont* [122] the employee agreed to be subject to a very wide restraint for one year. He was given almost all the benefits which he had received as employee during this period. Counsel for the employer argued that the huge consideration showed that the restraint had to be treated as if it operated during employment and that much *wider* and *more flexible* protection could be gained. The court correctly rejected this submission. It would create very difficult problems, and be contrary to authority and thus far accepted principles. Direct consideration has only played an attitudinal role within the reasonableness test.

The courts abandoned examination of adequacy of consideration within the doctrine of valuable consideration because of the difficulties in determining adequacy [123]. It will be difficult to determine when consideration will exactly match the value of the restraint. However, no precision will be required if adequacy is considered within the reasonableness test as described above. Courts will merely take adequacy of consideration into account if there are strong pointers either positively towards adequacy or negatively towards inadequacy. More flexibility will be infused because adequacy of consideration will, even then, not be conclusive.

10.Further reasonableness factors

The courts have also considered other factors that may impact on reasonableness [124]. It will be relevant if the restraint, for any other reason beyond adequate consideration and equality of bargaining power, causes hardship for the covenantor, on the one hand, or if it is palpably fair towards him on the other.

The width of the restraint on the three levels already mentioned will be relevant [125]:

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[121]. Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 329-330.
[122]. JA Mont (UK) Ltd v Mills [1993] FSR 577 at 587-588.
[123]. See supra 9.
[124]. Heydon especially at 164 et seq tried to force in too much under the rubric of adequacy of consideration.
[125]. Winfield (1946) 320; Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248 although it is not clear; Supra 8.1.

- Courts have been slow to recognise restraints that are world-wide, almost world-wide, nation-wide, or in any other sense so wide that it will make severe spatial inroads into the covenantor's ability to work. It has also been considered that such restraints should be dealt with strictly because they constitute severe inroads upon freedom of work [126]. Conversely, a restraint that is spatially narrow will allow the covenantor to trade outside the restricted area, and the courts will accordingly be more benevolent towards it [127]. However, this factor cannot be of fundamental importance. In *Prontaprint* [128], a franchise case, the court placed too much emphasis on it.
- Restraints that restrict the covenantor for life, or restraints that in other senses make a severe temporal inroad upon the covenantor's ability to work, will be treated strictly. It is possible that such restraints will radically interfere with the ability of the covenantor to work [129]. Courts will be more favourably disposed to restraints that are of shorter duration [130].
- Activity restraints will also have a wider impact if the scope of a restraint is more limited, because it will allow the covenantor still to use his ability to work outside the narrowly defined field [131]. Conversely the courts will be slow to allow wide activity restraints because it will make greater inroads into the covenantor's ability to work.

Facts peculiar to the particular circumstances of the case may influence the reasonableness towards the covenantor [132].

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[126]. Ward v Byrne (1839) 5 M & W 548 at 562; May v O'Neil (1875) 44 LJCh 660; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 314; Suggested by counsel Caribonum Co Ltd v Le Couch (1913) 109 LT 385 at 389 but not supported on the facts; Herbert Morris 698-699, 706 and 718; Vandervell Products Ltd v MacLeod [1957] RPC 185 at 191 and at 190 the discussion of the judgment of the court a quo; Dumbarton Steamboat Co Ltd v MacFarlane (1899) 1 F 993 at 997; It played some role Remington Typewriter Company v Sim (1915) 1 SLT 168 at 170; Woolman 257 but see infra Ch 11.5.1; Basson v Chilwan 1993 (3) SA 742 (A) 778-779.

[127]. Dubowski v Goldstein [1896] 1 QB 478 at 486; Eastes v Russ [1914] 1 Ch 468 see Swinfen Eady LJ 481-482; Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1112 although it was here wrongly considered under the public interest leg; Stewart v Stewart (1899) 1 F 1158 at 1169; Fenner-Solomon v Martin 1917 CPD 22 at 23; Savage and Pugh v Knox 1955 (3) SA 149 (N) 156; Nachtsheim v Overath 1968 (2) SA 270 (C) 274, 276; Rogaly v Weingartz 1954 (3) SA 791 (D) 794; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 544.

[128]. Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 325.

[129]. On lifelong restrictions see supra 8.4 especially Eastes v Russ [1914] 1 Ch 468 at 476; The minority in Stewart v Stewart (1899) 1 F 1158 at 1167 although too much stress was probably placed on these factors; In Pratt v Maclean 1927 SN 161 it looks as if the court saw this factor as conclusive.

[130]. Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 513.

[131]. Moenich v Fenestre (1892) 67 LT 602 at 603; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 13, 24-25 where the enforcer argued that the restraint still left wide activities open to the covenantor but the court did not accept this on the facts; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 at 395; Blake 676-677; Ex parte Spring 1951 (3) SA 475 (C) 479; Savage and Pugh v Knox 1955 (3) SA 149 (N); Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 613; Madoo (Pty) Ltd v Wallace 1979 (2) SA 957 (T) 958; See supra Ch 8.5.4.

[132]. Blake 650, 685-686; Heydon 171.

- In England and Scotland the courts should take a more positive stance towards a restraint if the parties at conclusion contemplated the protection when the covenantor retires or where it is realistic to expect that he will retire from a certain field of business on the restraint coming into effect [133]. South African courts should be more benevolent towards a restraint if it actually has this effect.
- The possibility of finding alternative employment will be relevant. The courts will be more sceptical of a restraint if the labour market in which the covenantee acts is of such a nature that realistically he will find it difficult to get work in the field in which he was trained [134]. The court will be more benevolent towards a restraint where the covenantor will easily find alternative employment outside the fetters of the restraint [135]. In *Steiner* [136] the court did not really discuss the importance of the fact that the restraint, although not wide, would exclude the covenantor from practising within an area of Glasgow where all skilled hairdressers had their businesses, but it was not unsympathetic to such an argument. In *Herbert Morris* [137] the court considered that the covenantor would have to leave a long established home to find work elsewhere. But the impact of this in England and Scotland should be limited by the time at which reasonableness can be determined.
- It might be of some importance that the covenantor will not be impoverished while subject to the restraint (although this last mentioned factor should not carry too much weight) [138]. It will, moreover, be necessary in South Africa to look at the manner in which an employee was treated during employment. In *Magna Alloys* [139] it was accepted in the court a quo that it was unreasonable for the covenantee to enforce the restraint because the covenantor, a salesman, was not provided with enough products for sale. Rabie CJ did not accept this argument on the facts. However, this factor may in future be regarded as relevant where unreasonableness can be shown.

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[133]. Mitchel v Reynolds (1711) 1 PWms 181; Wallis v Day (1837) 2 M & W 273; Nordenfelt 567; Cf Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 807, 810 acknowledged that it was not necessarily the aim of the covenantor; Spink (Bournemouth) Ltd v Spink [1936] Ch 544 at 548; Turner 120 said such questions will only come before the court if the covenantor has in fact started working again and that it was therefore irrelevant but this is doubtful; Weinberg v Mervis 1953 (3) SA 863 (C) 867; Wohlman v Buron 1970 (2) SA 760 (C) 763.

[134]. Heydon 171; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313 placed too much emphasis on this; Cf Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 346.

[135]. Whitehill v Bradford [1952] Ch 236 at 251; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 363 where the court was hesitant to consider such factors; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313 see however the criticism supra; Basson v Chilwan 1993 (3) SA 742 (A) 764, But see the criticism 778-779; Schoombee 141.

[136]. Steiner v Breslin 1979 SLT (Notes) 34; Woolman 255; See also the mention made of this issue in SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36 where the court accepted that important competition took place in the centre of the city but that there was still considerable business outside the centre in which the covenantor could take part.

[137]. Herbert Morris 706.

[138]. Anthony v Rennie 1981 (Notes) 11 at 12 where this was considered in determining the balance of convenience.

[139]. Magna Alloys 905; Cf British Mannesmann Tube Co Ltd v Phillips (1903) 48 Sol Jo 117 although it is doubtful whether this could have been considered.

- A difficult problem that has been posed on several occasions is: To what extent will the cause of termination of an employment or partnership contract influence the restraint? This is so important and the problems here are so intricate that it deserves separate discussion.

11. Reasonableness towards the covenantor and the mechanism by which a restraint comes into effect after contracts of employment or partnership [140]

The reasons for termination of an employment contract that brings a restraint into effect may play some role in determining its effect, and these issues need to be discussed in some detail. However, the position in post-employment contracts must not be confused with the type of cases where a business is sold and the covenantor agrees to work for the covenantee, with a full restraint coming into effect when the employment comes to an end [141]. In such cases the restraint will be based on the sale of business and not on the employment. The causes for the termination of employment will mostly be insignificant and restraint may come into effect even on breach by the covenantee [142]. The employment relationship in such cases will merely defer the restraint.

11.1. Mechanisms outside breach by the covenantee

Post-employment or partnership restraints will normally come into effect where the main contract is terminated on notice [143]. But they may also come into effect along other avenues If the employment is terminated by agreement, the contract that contains the restraint and the one that ends the relationship must be interpreted to determine whether the restraint in the first contract still stands [144]. The restraint will have full effect even where an employment contract is cancelled due to the breach of the covenantor unless this is clearly excluded by the contract [145].

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[140]. See Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) where the fact that the restraint would work differently depending on the manner in which the main contract operated was not really discussed.

[141]. See supra Ch 7.1.1.

[142]. See infra 11.3.

[143]. See Giles v Hart (1859) 1 LT 154 at 155; The court in Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 238 overlooked this.

[144]. See Proctor v Sargent (1840) 2 Man & G 20 infra; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 944-946, 961, 965, 969.

[145]. Croft v Hawe (1836) Donnely 82 where counsel argued that the restraint came into effect when the contract was cancelled because of breach but the court did not discuss it; Proctor v Sargent (1840) 2 Man & G 20 at 32 and the question to counsel 29; Although there is not enough facts probably Howard v Danner (1901) 17 TLR 548; Measures Bros Ltd v Measures [1910] 2 Ch 248 at 255; See Hadsley v Dayer-Smith [1914] AC 979 at 981 where the contract expressly provided for "expulsion"; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 238.

In England and Scotland these grounds for the termination of the employment will play no more than an attitudinal role [146]. It may be of some relevance that the contract has been terminated by the employer. There are very persuasive reasons for dealing more strictly with restraints if they also deprive the covenantor of his freedom to choose whether he wants to work for the employer or be restrained. However, the courts in these legal systems will not be able to look at the actual reason for termination. There will be few cases where the facts of the case at conclusion will give the court any assistance in determining this issue. It will therefore be mostly neutral, although there might be some exceptions.

The position will be different in South Africa. In *Edgecombe* [147] De Villiers CJ doubted whether a restraint would be enforced if the employment contract was terminated by the employer. But it was not necessary to decide the issue in this case, and it seems that the court was discussing the question whether an interdict could be granted. The problem in these types of cases was not properly discussed in later decisions [148]. But all kinds of new avenues have been opened for South Africa by *Magna Alloys*. Here reasonableness will be determined from the moment when the court is asked to enforce the restraint. The reasons why the restraint came into effect will often be one of the factors that the court may consider [149]. They may now give effect to the priorities of the principles underlying the restraint of trade doctrine [150].

11.2. Breach by the covenantee in England and Scotland where the parties have not particularly provided for it

The position will be wholly different where the contract of employment is terminated by the breach of the covenantee. It was initially accepted in *Proctor* that a breach of the covenantee would be irrelevant to the enforcement of the covenant [151]. But this view has been reversed [152]. The courts

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146. Cf the argumentation of the court Moenich v Fenestre (1892) 67 LT 602 at 604; Cf Blake 685 states that reasons for termination per se will often impact upon the question whether an equitable remedy can be granted; Smith & Wood 143 it is still an open question how unfair dismissal will influence reasonableness.

147. Edgcombe v Hodgson (1902) 19 SC 224 at 225.

148. Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 349; U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 148; Freight Bureau (Pty) Ltd v Kruger 1979 (4) SA 337 (W) 339.

149. Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 461 there are indications that the court would have considered this as relevant if it could be proved.

150. See supra Ch 3.

151. Proctor v Sargent (1840) 2 Man & G 20 at 32, although it was accepted that proper performance was averred 35; Cf Curtis v Sandison (1831) 10 S 72 at 74 per Lord Moncreiff regarded the breach question as irrelevant for the purpose of interdict.

152. Heydon 299; Cf Rayner v Pegler [1964] EG 301 where this issue was not finally decided because there was a dispute about repudiation.

in Scotland and England have accepted that a restraint will not come into effect if the contract is terminated in this manner, although the reasons given for the approach are difficult to grasp [153].

On appeal in *Measures Brothers* [154] Cozens-Hardy LJ decided that the covenantee could not get equitable relief where he himself did not perform his side of the bargain, although he regarded it as unnecessary to determine whether the obligations were "strictly interdependent". But many cases will fail on more fundamental grounds.

Joyce J at first instance, and Kennedy LJ on appeal in *Measures Brothers* [155], relied on *Billposting* [156], but they seemed to have drawn another conclusion from it. Joyce J stated that:

> "the plaintiffs are not entitled against this defendant to specific performance ... without performing - and they cannot perform - the clauses which that agreement contains in favour of the defendant. In my opinion it would be inequitable if the plaintiffs could have that relief, and I decline to give it."

It is difficult to determine what the courts intend here, but it seems that they thought that the restraint could not be enforced because counter obligations had not been performed. However, this notion is a red herring. The question here is not simply whether there is mutuality between obligations so that one party may refuse to perform where the other has not properly performed. It is rather whether a restraint, intended to come into effect on termination of the relationship between the parties, survives the termination for breach. The mutuality of obligations might assist in showing that an obligation would not survive the contract, but it cannot be the point of focus here.

In *Billposting* [157] both Lord Robertson and Lord Collins stated that the contract was breached, that it was rescinded and that further performance was no longer necessary. Lord Robertson added

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153. Davies 493; The principle was apparently accepted in a series of cases where it was found that no breach occurred: Howard v Danner (1901) 17 TLR 548 at 549 wrongfulness that would cause an injunction to be refused not shown on the facts, Apparently Automobile Carriage Builders Ltd v Sayers (1909) 101 LT 419 at 420 although the theoretical issue was not discussed, Konski v Peet [1915] 1 Ch 530 at 538, See Chitty 1201, Dickson v Jones [1939] 3 All ER 182 at 184-187, Heydon 299, Office Overload Ltd v Gunn [1977] FSR 39 at 42; Spencer v Marchington [1988] IRLR 392 at 395, Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 484, 485-486, Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868, Scotcoast Ltd v Halliday 1995 GWD 7-355 and Hutchison & Craft v Burns 1994 GWD 26-1547; Cf SW Strange Ltd v Mann [1965] 1 WLR 629 at 637 although the connection which the court made with these cases was somewhat oblique; Cf also Symphony Group plc v Hodgson [1994] QB 179 and the arguments of counsel although the case turned on other issues; McBryde 594 did not properly appreciate the problems in this area.

154. Measures Bros Ltd v Measures [1910] 2 Ch 248 at 254, Cf 262 although Kennedy LJ also looked at what he regarded as more fundamental issues; Chitty 1202.

155. Measures Bros Ltd v Measures [1910] 1 Ch 336 at 345-346, Measures Bros Ltd v Measures [1910] 2 Ch 248 at 262; Christie *Encyclopaedia* 596 seems to combine both the last mentioned two views; Gloag 573.

156. Infra.

that the restraint was ancillary to the employment contract. But this begs the question. All post-employment restraints rise from the ashes of terminated contracts. Restraints normally spring from termination. It was shown above for instance that the restraint would not fall away if the contract is rescinded on breach by the employee and this defence can accordingly not apply absolutely.

In *Briggs* [158] the court declared that the restraint would not survive the cancellation on breach and that the result "would not depend on the construction of the contract", but this is unacceptable. As a general point of contract law there is no reason why the parties cannot agree that a certain obligation will endure cancellation. Davies [159] stated that a restraint would not survive cancellation if such cancellation was ex lege and not rooted in consensus. But this is not a sufficient answer. Many ex lege consequence of a contract can also be altered by the parties.

Kennedy LJ in *Measures Brothers* [160] at least accepted that the question of whether a connection existed must be determined with regard to "the intention of the parties and the good sense of the case". Still, it is suggested that a different intention must be sought and the good sense should be investigated on a different level than the one suggested by the court.

The best approach would be to focus on the termination and to accept that a termination for breach will normally also terminate the restraint [161]. But that does not mean that the principle will be absolute. It cannot limit the survival of the restraint after termination on breach if the parties clearly intended it to do so.

11.3. Breach by the covenantee in South Africa where the parties have not specifically provided for it

In South Africa the position is also confusing [162]. In *U-Drive* [163] the court combined the two arguments in English law mentioned above. It first stressed that such clauses could not be

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[157]. General Billposting Co Ltd v Atkinson [1909] AC 118 at 121, 122; Measures Bros Ltd v Measures [1910] 2 Ch 248 at 255-257 took a similar view of the law although it was decided that it did not apply on the facts; Briggs v Oates [1991] 1 All ER 407 at 416-417 stressed both these points and held that they were different ways of saying the same thing, See the criticism Davies 494; See Rock Refrigeration Ltd v Jones Times October 17 1996, but see the more acceptable view of Philips LJ; Chitty 1201; Heydon 299; Winfield (1946) 320.

[158]. Briggs v Oates [1991] 1 All ER 407 at 417; See Rock Refrigeration Ltd v Jones Times October 17 1996, but see the more acceptable view of Philips LJ.

[159]. Davies 494.

[160]. Measures Bros Ltd v Measures [1910] 2 Ch 248 at 262.

[161]. Infra 11.5.

[162]. Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 401 where the covenantor argued that the restraint would not come into effect on breach by the covenantee but the court did not accept that it had taken place.

[163]. U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 149-150.

enforced because of the exceptio non adimpleti contractus, but it then went on to mention the point that the restraint would fall away on cancellation for breach. This judgment is subject to all the criticisms of the English law mentioned above.

In *Drewtons* [164] Watermeyer JP took it even further. He held that restraints that were intended by the parties to come into effect even if the contract was terminated by breach of the covenantee did not influence reasonableness, because a restraint could not come into effect after termination on breach by the covenantee. This is unacceptable unless it can be said that the court thought that the clause should be narrowly interpreted [165], but the judge more likely attempted to make a general point [166].

It was correctly held in *Capecan* [167] that a restraint may, by agreement, be extended beyond termination even on breach. The judge submitted that the principle was too widely stated in *Drewtons,* although she acknowledged that breach by the covenantee may be a defence on the true construction of some contracts. As regards the question of restraints that are not extended beyond breach by the parties, the case contains only one problematic element. The court noted that Watermeyer JP in *Drewtons* [168] had presumably relied on the exceptio non adimpleti contractus as the basis upon which enforcement should not be allowed, and this is probably a correct interpretation of *Drewtons*. However, the latter case is unacceptable in so far as it was accepted that the exceptio could play a role in these cases. The problem here is, rather, that the contract has been terminated and that the restraint has not survived the termination. The court in *Chubb* [169] was led astray by the notion that the exceptio non adimpleti contractus comes into play here. It again did not see the principles expressed in *Drewtons* as absolute (although this aspect of *Drewtons* was not expressly discussed). But the restraint in casu was regarded as still prevailing on the basis that the obligations here were not reciprocal. The court was probably correct in its conclusion that the restraint would survive the contract, but the emphasis should have been somewhere else.

It is hoped that the South African courts will in future properly assess the legal issues that come into play here. The question whether obligations are reciprocal should only be of evidential value. The courts will have to look at the intention of the parties to determine whether they have also intended the restraint to come into effect on breach by the covenantee.

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[164]. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 308.
[165]. Infra 11.5.
[166]. Cf the more acceptable view on this point in Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W) 362.
[167]. Van Den Heever J in Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 459.
[168]. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 308.
[169]. Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W) 363-364.

11.4. Clauses that extend the operation of a restraint to cases of breach by the covenantee

The next question accordingly is: what will be the position if the parties expressly agree that the restraint in post-employment and partnership cases should come into effect even if the contract is cancelled for the breach of the covenantee?

11.4.1. The English and Scottish approach

In English law the court in *Briggs* [170] was confronted by a clause that the restraint would come into effect if the contract "shall have determined for any reason whatever". The court also refused to enforce the restraint because it would be unreasonable between the parties.

This will carry matters much further where the restraint was intended to apply on breach [171]. There will be good grounds for finding that a restraint is unreasonable if it will allow the covenantee to breach the contract and then come back to enforce the restraint. Scott J put it thus:

> "A contract under which an employee could be immediately and wrongfully dismissed but would nevertheless remain subject to an anti-competitive restraint seems to me to be grossly unreasonable. I would not be prepared to enforce the restraint in such a contract".

If this view is accepted there will be at least one ground upon which a contract can be found to be unreasonable merely because it is grossly unfair to the covenantor.

However, the approach is also open to criticism. On a formal level there is, except for *Briggs*, no real authority for this point. In *John Michael Design* [172] the restraint explicitly provided that it would come into effect even on breach by the covenantee, but this issue was not taken up. On a substantive level the arguments in *Briggs* and the Scottish cases can be countered on the grounds that:

- The covenantee will often still have interests that he should be able to protect in these cases.
- The only real loss for the employee will be that he will not have the buffer provided by notice. It might be that this buffer does not provide much further protection anyhow.

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170. Briggs v Oates [1991] 1 All ER 407 at 417; D v M [1996] IRLR 192.
171. Living Design (Home Improvements) Ltd v Davidson [1994] IRLR 69 at 71, Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160. But see the criticism infra 12.5.
172. John Michael Design plc v Cooke [1987] 2 All ER 332.

- The loss of notice might be adequately compensated by a claim for damages [173].
- The approach is very rigid. Reasonableness must be determined from the moment of conclusion. The question is whether the contract extended to cases of breach as reasonableness is determined from the moment of conclusion [174]. The contract in the *Briggs* case was determined by the breach of the covenantee. But there are cases where this principle will work harshly. In *Living Design* the suggestions by counsel that the contract had been unlawfully terminated by the employer were not investigated. In *Lux Traffic* [175] counsel for the pursuer pointed out that the contract was not actually unlawfully terminated, but this was again not discussed by the court. Hence in *Rock Refrigeration* [176] Philips LJ regarded the possibility of repudiation as too remote a contingency.

There is great difficulty in choosing between the possibilities and the court should, therefore, not take an uncompromising position either way. These issues were not properly discussed in the cases. The most acceptable solution would probably be to balance the minimum duration of the contract if terminated by legitimate means with the possibility that breach can occur immediately. A restraint that would also come into effect on breach should be unreasonable - even if there is no real prejudice on the facts - in a case where it is foreseeable that the covenantee can place the covenantor in a very difficult position, i.e. where the contract can only be legally terminated after a considerable time but where the contract provides that the restraint will also come into effect on breach. It is an inflexible position, but English and Scottish courts are forced into it because of the rules regarding the time at which reasonableness should be determined and because of a narrow approach to severability [177]. The courts, confronted by two unsatisfactory possibilities, probably followed the most acceptable general principle.

11.4.2. The approach in South Africa

Southern African courts have been too benevolent towards restraint of trade clauses that might come into effect on breach by the covenantee [178].

- *Commercial and Industrial Holdings* proposed that reasonableness should not be influenced by such clauses but that damage should be recovered in an action based on the breach [179]. Yet

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[173]. Proctor v Sargent (1840) 2 Man & G 20 at 32 discussed supra 11.4; Cf also Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 238 discussed infra.
[174]. Briggs v Oates [1991] 1 All ER 407 at 417.
[175]. Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1159.
[176]. Rock Refrigeration Ltd v Jones Times October 17 1996.
[177]. Infra Ch 13, 14.
[178]. See also Amalgamated Retail Ltd v Spark 1991 (2) SA 143 (SEC) 147 decided that it was not necessary to determine whether a franchise contract was terminated by breach or because of notice of cancellation.

a restraint often causes more than pecuniary loss and it will be very difficult to provide proper monetary compensation.

- In *Capecan* [180] Van den Heever J held that it would not be unconscionable to uphold a restraint even where the employment was terminated by the breach of the employer. But this viewpoint has been criticised [181]. The judgment seems to beg the question that is relevant here and it is also too rigid when the basic post-*Magna Alloys* principles are considered. The court argued that all such restraints are collateral agreements that are intended to have an existence independent from the employment. But the big question here is: to what extent should such independence be allowed to exist? These types of restraints may constitute severe inroads upon the covenantor's freedom of work. The argument of the court did not take it much further.

It therefore seems that cancellation on breach by the covenantee should still affect reasonableness in South Africa. However, in post-*Magna Alloys* South African law, the legality of the restraint is considered at the moment when the court is asked to enforce the restraint [182]. It must be asked whether this new approach will affect the position.

A restraint will now be reasonable if full enforcement on the facts as they exist when the court is asked to enforce it will be reasonable [183]. Yet a restraint will still be ineffective if it will not be reasonable to enforce it to its full extent on the facts at this point, and it will not make a difference if the enforcer can only rely on part of that restraint. A part of a clause will only be enforced if the whole is also enforceable, or if the part that is to be enforced can be separated in accordance with the principles of partial enforcement [184].

But the situation under discussion does not clearly fit within this scheme. Here the facts may cause part of the clause to fall away. Hence two possible views can be taken:

- On a formalistic view the changes made in *Magna Alloys* would be irrelevant. The courts may remain interested in the manner in which clauses are framed. Thus they would still not

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179. Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 238, See supra 11.4.2 and the view in Proctor v Sargent.

180. Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 460 accepted by Kerr 505.

181. Christie 445 although Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) on which he relied concerned a different issue; Magna Alloys 905 suggested that it would have made a difference if the covenantee was in breach by not supplying the covenantor with sufficient sales articles. But the precise effect was not analysed; Bonnet v Schofield 1989 (2) SA 156 (D) 160 the problems of whether a restraint would outlive breach was not discussed. See on the interpretation of this clause infra 11.5; Cf also Botha v Carapax Shadeports (Pty) Ltd 1992 (1) SA 202 (A) 215 where the question of correctness was left open.

182. See infra Ch 13.

183. Infra Ch 15.1.

184. Infra Ch 14, 15.

allow parties to conclude these clauses on the basis that they were aimed at applying in certain situations in which they would necessarily have been ineffective.

- On the second or objective view, the all-important factor is that the court must ask whether the clause, which the court is asked to enforce, is ineffective on the facts when the courts are asked to enforce it. Here the time at which the court is asked to enforce the restraint is pivotal. That the clause would necessarily have been ineffective on another mutually exclusive set of facts also provided for in the contract is then irrelevant.

Both views have much to commend them. However, the emphasis which the courts have placed on the notion that enforceability is fundamental will make the second alternative preferable.

Botha J who, in *National Chemsearch* [185], piloted the new approach to the time at which reasonableness should be determined, certainly followed this approach, although he did not properly evaluate the arguments against it. The problem is that courts would want to discourage clauses that will in certain circumstances always be unreasonable. The strongest form of discouragement would be to reject all such clauses. But it seems that the *National Chemsearch* approach is probably still more acceptable. More subtle possibilities will exist if this alternative is accepted. The courts will not look at the *possible* causes that *may* bring the restraint into effect, but the real reasons for its coming into being, and the real circumstances surrounding the termination of the contract will be relevant.

- The restraint will not be unreasonable merely because it may come into effect on breach by the covenantee if this contingency does not materialise.
- A restraint will not necessarily be unreasonable if it does come into effect on the breach of the covenantee. The court will be able to look at the facts of the particular case to a much greater degree. The actual effect of the breach can be considered.

11.5. When can a clause be interpreted as also coming into effect on breach by the covenantee?

It will be difficult to determine when a clause can be interpreted also to come into effect on breach of the covenantee. Some cases will be simple. In *Living Design* [186] the clause was clearly too wide. It was explicitly provided that the restraint would come into effect whether the employment was

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[185]. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1108; That makes the first interpretation of Howard v Danner (1901) 17 TLR 548 supra 11.2 a realistic possibility in South Africa.

[186]. Living Design (Home Improvements) Ltd v Davidson [1994] IRLR 69; See also NCH (UK) Ltd v Mair 1994 GWD 34-1986 where the court held that the clause did not "require to be read as extending to unlawful termination" although the clause itself was not stated in the report.

lawfully or unlawfully terminated. But it will in most cases be very difficult to discern any clear intention.

The court should be reluctant to accept that clauses are so widely phrased. The purpose of a post-employment restraint is to protect the covenantee after ending of the work relationship with the covenantor. But restraints flow from preceding relationships, are closely tied to them and dependent upon them for their usefulness and validity. It sounds somewhat extraordinary for the covenantee to defy the contract but rely on the restraint [187]. Courts have always been slow to extend restraints by interpretation and it is suggested that this reluctance should be continued here.

Clauses where the parties merely talk of the restraint coming into effect on "termination", "cancellation" or "on the contract being ended" normally should be interpreted as excluding cancellation on breach by the covenantee [188]. In *Bonnet* [189] it was agreed that the restraint would come into effect "after the termination of employment". The court decided that the restraint in this case came into effect on termination of the actual work relationship even if the contract was still not terminated. Broome J so interpreted the contract, because he wanted to avoid difficult problems concerning the time of termination of the restraint that would otherwise arise. However, it is suggested that they cannot be avoided unless the parties clearly evince the intention to establish a restraint that operates from the moment where the relationship is at an end. Words like these are mostly used to denote termination of the contract even if the contract itself is not mentioned [190].

In *Briggs* [191] the court did not think it necessary finally to interpret the clause that was to the effect that the restraint would come into operation "for any cause whatever". However, the issue is of fundamental importance. The "for any reason whatever" phraseology is almost standard in restraint of trade cases. Before the recent spate of cases the courts in England and Scotland have never doubted the validity of restraints merely because they contain such phrases [192]. If the third

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187. The qualification in Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) would therefore be a clause ex abundanti cautela.

188. A clause will be narrower if it is only agreed to come into effect on termination see Aramark plc v Sommerville 1995 GWD 8-408 where Lux Traffic was distinguished.

189. Bonnet v Schofield 1989 (2) SA 156 (D) 160-161.

190. Cf Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 346-347.

191. Briggs v Oates [1991] 1 All ER 407 at 417.

192. Some clauses were enforced although they contained clauses that stated that restraints would come into effect if the contract was terminated for any reason: Moenich v Fenestre (1892) 67 LT 602, Davies Turner & Co v Lowen (1891) 64 TLR 655, Rogers v Maddocks [1892] 3 Ch 346, Welstead v Hadley (1904) 21 TLR 165 although this concerned a sale of goodwill, Continental Tyre and Rubber Co (GB) Ltd v Heath (1913) 29 TLR 308, Putsman v Taylor [1927] 1 KB 637, Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472, Lawrence David Ltd v Ashton [1989] ICR 123, Business Seating Ltd v Broad [1989] ICR 729, Group 4 Total Security Ltd v Ferrier 1985 SC 70,

point of the court in *Briggs* is applied to such cases they will suddenly be ineffective! However, it is submitted that the courts can simply interpret "any reason whatever" clauses narrowly. Cancellation for "any reason whatever" would then only mean legal cancellation or cancellation because of breach by the covenantor. Accordingly the rejection of the clause in *Lux Traffic* cannot be accepted [193]. The restraint here would come into effect "however such employment may be determined"; the court should have placed a narrower interpretation on it. In *Hutchison* [194] it was held that "The phrase 'howsoever arising' on its own could not be interpreted as an attempt to avoid the mutuality of contracts rule", and this appears to be a more acceptable interpretation.

In some cases in South Africa the issue was also not touched upon [195]. In other cases the court leaned towards limiting the effect of such clauses to cases where the contract ceased for reasons other than the breach of the covenantee [196]. However, there is also considerable authority for the view that such clauses will include breach by the covenantee [197]. In *Chubb Fire Security* [198] the court again decided that these contracts should be interpreted as including breach by the covenantee. The contract specifically enumerated the grounds for termination, but the court accepted that this did not influence the meaning of the "termination for any reason whatever" clause in the restraint. This is strange, especially if it is considered that the court acknowledged that there were cases where it was accepted that such clauses should be interpreted narrowly. The clause in this case should have been analysed in context. The covenantor sold a business to the covenantee and then agreed to work for the business. The case accordingly deals with a sale of

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Remington Typewriter Company v Sim (1915) 1 SLT 168, Steiner v Breslin 1979 SLT (Notes) 34, A & D Bedrooms Ltd v Michael 1984 SLT 297, SOS Bureau Ltd v Payne 1982 SLT ShCt 33, Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868 here there was a question about the legality of termination but this clause was not brought into issue; In other cases restraints were not upheld, but not on the basis of the "any cause whatever" clauses: Gophir Diamond Co v Wood [1902] 1 Ch 950, Vincents of Reading v Fogden (1932) 48 TLR 613, SV Nevanas Ltd v Walker and Foreman [1914] 1 Ch 413, Rentokil Ltd v Hampton 1982 SLT 422, Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354.

193. Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160.

194. Hutchison & Craft v Burns 1994 GWD 26-1547.

195. Federal Insurance Corporation of SA Ltd v Van Almelo (1908) 25 SC 940; Lewin v Sanders 1937 SR 147 at 151; Rogaly v Weingartz 1954 (3) SA 791 (D), Nachtsheim v Overath 1968 (2) SA 270 (C); Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C); Basson v Chilwan 1993 (3) SA 742 (A); Cf Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W) 416 and the suggestions of counsel on the meaning of the clause where it was determined that the restraint would come into effect on "his [the covenantor's] termination of his employment with the company for whatsoever reason" but it was not discussed.

196. Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 349 is not clear on this point. The court used very wide language but the example mentioned still falls within the interpretation set out above; In Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 406 with reference to Biografic.

197. Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 238 although it was not really discussed because the court felt that a restraint would come into effect on breach anyway; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 362 seems to interpret Biografic as also including determination due to breach; The interpretation itself was not attacked in National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1108; Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 459-460.

198. Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W) 362.

business restraint. In such cases the reasons for termination of the employment will be of lesser importance because the restraint is not based on the employment. This weighed heavily with the court [199]. The English and Scots approach should also be applied in South Africa with regard to true post-employment restraints.

12. A more extensive role for the interests of the covenantor: conclusions and predictions

The interests of the covenantor often dovetail into the covenantee-oriented legitimate interests test in the wide penumbra of uncertainty that surrounds the firm nucleus of that test. But in all three systems the wider approach to newer types of restraints may provoke a rethink. Moreover, in South Africa the latest developments have also created some scope for a wider reasonableness test. The *Magna Alloys* case, with its vague discussion of reasonableness inter partes, may, in general terms, provide some impetus for wider consideration of reasonableness issues [200] although this wider possibility has not yet been utilised by courts. In *Basson* [201] Nienaber JA formulated a new test that has been echoed in several later cases [202]. He suggested that the interests of the covenantee should be weighed quantitatively and qualitatively against the interest of the covenantor in being economically active, and this may also opaquely contribute to a wider approach, although it is not directly aimed at balancing the actual position of the covenantor with that of the covenantee.

It has already been shown that a restraint which clearly does no more than reasonably protect the legitimate interests of the covenantee will mostly be legal, and it is hard to think that this apple cart can be upturned where the restraint will cause hardship to the covenantor. In this sense a restraint that is reasonable in the interest of the covenantee will also be reasonable in the interest of the covenantor. Only clear unreasonable inroads on the ability to work, such as some clauses that come or may come into effect on breach of the covenantee, should be sufficient to disrupt the validity of the contract in such cases [203]. Hardship for the covenantor will mostly play a role as an attitudinal factor.

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199. Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W) 364.
200. Schoombee 141.
201. Basson v Chilwan 1993 (3) SA 742 (A) 767.
202. E.g. Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 512.
203. Cf Heydon although he only briefly touched on this subject 262. He stated that it will require "undue harshness"; See 11.4.

But should it necessarily settle the matter if the restraint only protects interests, although not legitimate interests, of the covenantee [204]? There is a strong argument for also considering wider reasonableness issues when determining reasonableness in some cases. The restraint should perhaps also be held to be reasonable where it is very important for the protection of another interest [205] of the covenantee and is clearly fair towards the covenantor. The court will have to investigate the position of the covenantor to a much greater extent in these cases, and the same importance cannot be attached to the interest of the covenantee as in the case of proprietary interests. A much more direct weighing of the interests of the different parties will have to be undertaken. Protection should only be allowed where the restraint is neither oppressive, nor even merely neutral, but where it is clearly fair towards the covenantor.

In the classic restraint of trade cases the courts have stood on proprietary interests for very important reasons. There is no other work relationship between the parties when the restraint bites and it is fundamentally important to guard freedom of work. Nevertheless, it is difficult to see why the court should insist on proprietary interests where the restraint is clearly fair towards the covenantor [206].

The objections to this approach can all be answered:

- It can be argued that the restraint may still interfere with freedom of work in a manner that is contrary to the public interest. But the separate public interest requirement can be used to deal with this [207].
- It is important that the restraint of trade doctrine instil certain fundamental values into the market place. It should send a message to the market place, which is that freedom of work should not be easily interfered with. The strict requirement that only proprietary interests will be protected does much to promote this. However, extension of the reasonableness concept will not severely undermine it if such extension takes place along the lines proposed here.
- It may be argued that widening reasonableness inter partes would cause uncertainty and greater complexity in an area that is already inaccessible. However, certain safeguards are built into the system to ensure the maintenance of a core of certainty. The covenantee can still plan for the reasonableness of the restraint by heeding certain relatively simple principles. The covenantor cannot argue that widening would be unfair towards him because it will

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[204]. See this distinction supra Ch 6.16.1.

[205]. See Heydon 261 on the different types of interests although he did not properly keep newer and traditional restraints apart.

[206]. Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248 is the ideal starting point for modernising the restraint of trade doctrine in Scots law; The seeds of this are inherent in the approach of Van Heerden JA in Basson v Chilwan 1993 (3) SA 742 (A) 773-774.

[207]. See infra Ch 10.

remove his ability to plan, since it is regarded as morally reprehensible to plan for unreasonableness [208].

The cases where the notion of proportionality was rejected can therefore be answered if the weighing of the different positions of the parties is so undertaken. None of the cases contemplated the halfway house suggested here. The doctrine in classical cases is in danger of becoming stultified if some proportionality is not considered, but it is suggested that it should be done under these controlled circumstances.

A restraint will be reasonable inter partes in this wider sense if there is no abuse of bargaining power, if it is clearly reasonable towards the covenantor, and if it does not go beyond the interests, although not legitimate proprietary interests, of the covenantee. Thus where commercial interests are protected, the court should be prepared to uphold some restraints if the covenantor receives proper payment while he is subjected to the restraint.

A restraint should not be upheld merely because it is not unreasonable towards the covenantor or because it is in the interest, although not the legitimate interests, of the covenantee. Nor should equality of bargaining power or mere adequate consideration, of itself, be conclusive for allowing a restraint. The courts should in each case have a discretion to determine whether the freedom of work of the covenantor is properly guarded, and the extent to which positive fairness will have to be proved will depend on the gravity of the protectable interest and the width of the restriction.

The view of Chitty [209] that a restraint should be reasonable for the purpose of the restraint of trade doctrine if it is fair between the parties - even if the restraint merely protects competition or no interest at all - is therefore too wide and should be qualified. The only authority which Chitty can mention is the *A Schroeder* case but different considerations applied there [210]. The restraint applied during a work relationship and the interests of the parties were still intertwined. In Scotland Woolman [211] has argued that the fairness test of the *A Schroeder* case should be applied to classic restraints. He argued that this will ensure greater reasonableness towards the covenantor, but it is suggested that such a wide approach is not acceptable here. It will cause even more uncertainty in an area that is already very slippery. The proprietary interest test provides minimum guidelines. Change, to provide wider protection for the covenantor and covenantee, can probably be achieved

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208. Otto 209, Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 506 although he may protest about the uncertainty regarding his position, See infra Ch 13.4.2.
209. Chitty 1198; Heydon 265-266; See also Schoombee 140 who argued in this direction.
210. Supra Ch 6.1.
211. Woolman 257.

by qualifying it, rather than abandoning it completely. The compromise position suggested here is as far as the courts should go.

It has been suggested that the interests of the covenantor test should be extended [212]. However, the approach described here is much more flexible and practical. Not only is it very difficult to determine which interests should be protectable beyond proprietary interests, but extension should be determined by weighing broader reasonableness elements, because further interests will not be as fundamental as proprietary interests.

The position as it has thus far been set out can be summarised. The restraint will be effective if it protects legitimate interests of the covenantee. The covenantee can generally enforce such a restraint although the court may still in extreme cases find it to be unreasonable. The interest of the covenantee can be invoked as one of the attitudinal factors utilised to help the courts in making what are often very difficult decisions. Restraints which do not exceed protection of proprietary interests will mostly be upheld, and this will provide the pivot of certainty around which the doctrine will revolve.

The courts should be able to uphold a restraint where it exceeds the reasonable protection of the legitimate interests of the covenantee in certain limited circumstances:

- The restraint will still have to protect an interest, although not necessarily a legitimate interest, of the covenantee. The law of contract should establish certain principles in the market place, and one such important principle is that freedom of work should not be interfered with if a restraint is wider than any advantage to the covenantee.
- The court will have to exercise its discretion in favour of the covenantee. It can be proved that the restraint protects a very important although not proprietary interest of the covenantee, and that it is not unreasonable towards the covenantor. The covenantee may also protect weak interests if it can be shown that the restraint is clearly fair towards the covenantor.

[212]. Schoombee 142. See supra Ch 6.16.1.

Chapter 10

The public interest requirement

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1. The requirement that the restraint must not be unreasonable in the public interest

According to the *Nordenfelt* test a restraint of trade must not only be reasonable in the interest of the parties, but must also not be against the interest of the public. This has been accepted in all three legal systems [1]. The public interest requirement has survived the overhaul of restraint of trade law in South Africa in *Magna Alloys,* although the test has been differently phrased. The question in general will be whether the contract is against the public interest. The restraint will then probably be in the public interest if it is reasonable [2].

Kerr [3] argued that the court in *Kemp* [4] was wrong because it determined public interest issues before looking into reasonableness. He submitted that it was not the intention in *Magna Alloys* to change the order in which these issues are determined. That is correct, but there is no reason why the order in which these issues should be determined must be cast in stone.

2. Public interest, public policy and reasonableness inter partes

Many authorities state that the restraint must not be *unreasonable* in the public interest. But it is suggested that the word unreasonable in this context can only cause confusion. The practice here will therefore simply be to talk of the requirement that the restraint must not be contrary to the public interest.

The new approach in South Africa may cause some confusion when it is compared with its English counterpart. The broad principle underlying the doctrine, and public interest as a direct requirement for a restraint, are both called public interest in *Magna Alloys* and subsequent cases [5]. But the tests still have the same basic traits.

The public interest requirement has led some authorities to believe that the reasonableness requirement is unrelated to public policy, while public policy is represented by this second leg. However, the entire substantive restraint of trade test is based on public policy [6].

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1. Nordenfelt 565 see also 549; In some of the older cases the court placed considerable emphasis on the public interest: Horner v Graves (1831) 7 Bing 735, Whittaker v Howe (1841) 3 Beav 383, May v O'Neil (1875) 44 LJCh 660; George Walker & Co v Jann 1991 SLT 771 at 773.
2. Magna Alloys 893, Basson v Chilwan 1993 (3) SA 742 (A) 762.
3. Kerr *Tribute* 195.
4. Kemp Sacs and Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O) 687.
5. See also for use of this phraseology in England: Mason 740, Instone v A Schroeder Music Publishing Co Ltd [1974] 1 All ER 171 at 176, 177, 178, A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 621, See the confusion Treitel 419-420.
6. See supra Ch 5.3.1.

Broad public policy or public interest alone is too wide as a test [7]. A more specific reasonableness test that will resolve many of the problems in this area has been developed, and it is important to keep the two aspects apart.

The first leg of the restraint of trade doctrine is public policy crystallised into clearer rules. The second leg is a check-and-catch-all test. It allows for the consideration of relevant public policy elements that have not been discounted by reasonableness inter partes [8].

- The person who argues that the restraint is ineffective can put forward arguments showing that the restraint should not be upheld because of the interest which the public has in freedom of work. Only public policy surrounding freedom of work and the question whether freedom of work should be protected are important within the restraint of trade doctrine. Thus the freedom of work principle should here be approached from a direct public policy perspective [9].
- The enforcer may put forward wider public interest arguments to show that the restraint will have to be enforced. These arguments will then have to be compared with the fundamental notion that freedom of work should be protected.

3. The public interest requirement and judicial scepticism

The courts will be slow to accept that a restraint is ineffective for being contrary to public interest if they have already found the clause to be reasonable inter partes [10]. It has been accepted that

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7. Supra Ch 2.3ff.

8. Nordenfelt 566; The confusion of issues in Sainter v Ferguson (1849) 7 CB 716 will accordingly not be followed today; See the criticism of the Wyatt case infra 3.

9. Treitel 411; Heydon 267ff is based on a too wide view of the public policy that should come into play; Chitty 1199 is too wide.

10. E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 305; Attorney General of Commonwealth of Australia v Adelaide Steamship Co [1913] AC 781 at 785; North Western Salt Company Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 especially at 469-470, 471, 477-478, 479-480, 481, Cf (1918) 30 *Jur Rev* 5-6; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 563 although the court stated that it is not difficult to conceive of a case where public interest would come into play; Cf Joseph Evans & Co Ltd v Heathcote [1918] 1 KB 418 at 427, 429 and 433; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 195; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 239, Cf also 241 although it is doubtful whether actual damage must be proved; Petrofina (GB) Ltd v Martin [1966] Ch 126 at 138; Anson 324 and 327, Anson 329-330; Atiyah 345; Blake 650, 686; Cheshire Fifoot and Furmston 404, 412; Chitty 1199; Collinge 410-411, 412, 423; Heydon 29, 172; Haslam 92, 110-111; Hickling 35, 43; Woolman 255; MacQueen 345 stated that the defender in WAC Ltd v Whillock 1990 SLT 213 put forward public interest issues but it was not even discussed. He probably refers to the discussion of balance of convenience 218, See infra Ch 15.2.2; Whish *Stair Encyclopaedia* 1211 and the final conclusion 1213; Gloag 575-576; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 172; Nathan 41, 42; Lubbe and Murray 261.

there are only two cases, namely *Wyatt* and *Bull* [11], that have been decided on this point [12], although even these cases were apparently solved along different lines [13].

Many of the objections to considering public policy will reappear again [14], while there will also be special problems with the public interest requirement:

- Reasonableness has become clearly settled into rules and principles. The second leg will be wider and more discretionary; there are few principles and even fewer rules to go by [15]. Social and especially economic theories will have to be considered, and they not only conflict but also change constantly [16].
- It is in the public interest that contracts should be kept, and courts will be hesitant to avoid them on the basis of vaguer notions of public interest. Judges will be slow to hold a contract ineffective in terms of the public interest leg of the restraint of trade test [17]. Sanctity of contract will not be as important as it was in the 19th century but it will still be of relevance, particularly where public policy is woolly and not generally accepted. In *Mitchel* [18] the court accepted that it would not "set aside a man's own agreement for fear of an uncertain injury to him and fix a certain damage on another".
- Reasonableness inter partes discounts many of the public policy factors that are relevant in the field of restraints of trade [19]. The courts should refrain from looking at reasonableness inter partes under this rubric to avoid repetition and distortion of public policy [20].

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11. Wyatt v Kreglinger and Fernau [1933] 1 KB 793; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273.
12. Goodhart Note (1933) 49 *LQR* 465; Heydon 173, 267; Anson 328, Heydon 267, Cheshire Fifoot and Furmston 410, Spowart Taylor & Hough 748; Treitel 410
13. Wyatt v Kreglinger and Fernau [1933] 1 KB 793 Lord Macnaghten at 799 stated that the agreement was on the face of it too wide to be reasonable, Scrutton LJ 807, Greer LJ 808 and Slesser LJ 810 emphasised the generality of the restriction; The public interest argument was put forward to show that the contract was in restraint: 798-799, 806-807, 808, 809-810 although it is not clear, Anson 327-328 at least accepted that the restraint was also regarded as unreasonable inter partes; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 281, 284 285 accepted the validity of Wyatt and the scope issue was in the forefront here. The substantive issues were not discussed in any detail but they were dispatched on the basis that the contract was not reasonable; See how these cases were understood Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 391 where the emphasis was again placed on the jurisdictional issues in Bull and Wyatt.
14. Heydon 172; See supra Ch 2.
15. Hitchcock v Coker (1837) 6 Ad & E 438 at 445 mentioned by Heydon 172; Nordenfelt 566, 567 with reference to Davis v Mason (1795) 5 Term Rep 118 and Tallis v Tallis (1853) 1 E & B 391 at 413.
16. Spowart Taylor & Hough 749; Supra Ch 2, 3, Infra 5.1.
17. Printing and Numerical Registering Co v Sampson (1857) LR 19 Eq 462 at 465; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 305-306 although Vaughan Williams LJ 309 stressed that the public interest requirement would still be part of the law; Heydon 29, 267 although it is confusing, 273; Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1954) 71 RPC 1 at 13.
18. Mitchel v Reynolds (1711) 1 PWms 181 at 191.
19. Contra Dottridge Brothers Ltd v Crook (1907) 23 TLR 644 but the reasonableness test has undergone much refinement since the case; Petrofina (GB) Ltd v Martin [1966] Ch 126 at 138; Heydon 25, 172, 200; Chitty 1199; Blake 686-687; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 240 but see the

- The parties will not bring all the relevant evidence before the court. In court there is merely a dispute between the parties. They may attempt to hijack public policy for their own private purposes, and the public will not be properly represented [21].
- The court may feel that it does not have the necessary qualifications for dealing with such issues, and that problems of this nature should rather be referred to specialist institutions [22]. In *Esso* the court had the advantage of a Monopolies Commission report, but this will seldom be the case [23].

Hence, it has been suggested that the public interest test here is merely tautologous and that a restraint which is reasonable inter partes will always be reasonable in the public interest [24]. However, good reasons for maintaining the second leg of the doctrine exist [25].

4. Factors that may enhance the role of public interest arguments

In *Esso* [26], where a new type of restraint was concerned, it was stated that lawyers should today be more energetic in looking at broader issues of public policy. This will probably rub off on the attitude of the courts towards the old types of restraints. Yet the above mentioned obstacles will guarantee a limited application of this requirement. The *Esso* case has not led to any real expansion of the public interest requirement. Lord Hodson was the only judge in *Esso* who

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criticism infra 5.2; Alberts 295 accepted that the position inter partes will often not differ from the interests of the public.

[20]. For cases where too much emphasis was placed on this: Sainter v Ferguson (1849) 7 CB 716 at 729; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 314 although it is not clear; Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1112, See the more acceptable Stewart v Stewart (1899) 1 F 1158 at 1163.

[21]. Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 827 and 828; Atiyah 347; Chitty 1199; Cheshire Fifoot and Furmston 404; Heydon 30, 272 and the cases mentioned there.

[22]. Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 826-827; Cf United Shoe Machinery Co of Canada v Brunet [1909] AC 330 at 344 although the court probably did not address its arguments to this point; Chitty 1199; Anson 334; Atiyah 346, 347; Collinge 410; Heydon 30, 272; Korah *JBL* 254; Woolman 256; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 332.

[23]. Esso 300; 320, 322; Chitty 1217; Heydon *McGill* 350 and 353 see also the documents used in Sherk v Horowitz (1971) 25 DLR (3rd) 675 (Ont HC); Collinge 423; Turpin 104; J Bell *Policy Arguments in Judicial Decisions* 160-162; 171-173; For further discussion JTC Cases and Comments (1967) 12 *Jur Rev* 73ff and 76; Whiteman 507ff, 520; Korah *JBL* 253; Schoombee 151.

[24]. Cf already Sainter v Ferguson (1849) 7 CB 716 at 729; Routh v Jones [1947] 1 All ER 179 at 182 was highly critical; Chitty 1199, See Supra Ch 3.6.2; This is often done in reaction to perceived problems with the case of Wyatt v Kreglinger and Fernau [1933] 1 KB 793 see infra 5.2. Collinge 423 seems to argue for a pregnant concept of reasonableness 412 and 423.

[25]. Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 276 discussed by Treitel 410 but see supra, Treitel 420.

[26]. Esso 300-301, 318-319, 321, 324, 330, 340-341; Anson 324; Chitty 1199; Heydon *McGill* 343; Treitel 411, 420; Heydon *McGill* 343; Heydon 39, 41; See Heydon 260 he said that Lord Wilberforce tried to promote public interest in a series of cases including Esso; Guest 7; Perrins 67; Scott Robinson 161; Smith & Wood 137; Treitel 420; Turpin 106, 111-112; Spowart-Taylor & Hough 748-749; Wedderburn 150; Whish *Stair Encyclopaedia* 1211, 1213 although the author in the end accepted that its application will remain narrow.

Texaco [33] called "abstruse economic arguments" cannot in themselves be a ground for finding that a restraint should be contrary to public policy. Such arguments will often lack precision [34], and courts will find it impossible to rule on rival economic theories [35], while furthermore what is regarded as in the best economic interest may vary [36]. The court in *Texaco* [37] stated that "such business and economic judgements are by their nature matters of policy decisions by business administration, government or parliament". There are specialist institutions where these matters can be more properly evaluated [38].

The Court of Appeal decision in *Dickson* shows some support for such arguments. The case concerned limitations by the Pharmaceutical Society on the type of products that could be sold by pharmacies. Sachs LJ based his decision on public interest [39], and held that the restraint would:

- Decrease the number of small pharmacies and pharmacies in small villages where there also may be a great need for them.
- Limit the possibilities of competition by stopping second pharmacies from opening in some towns.
- Decrease the amount of suitable entrants into the profession and it might reduce the number of new pharmacies opening.
- Increase the prices of medicine because profits from other sources would be reduced.

But these points are very woolly and the reliance on them unprecedented.

A more careful approach was followed in the House of Lords. The question of public interest was left open by Lord Reid [40]. Lord Morris [41] argued that restraints of this nature also have to be in the public interest, but he only looked at this when he discussed the wider interests that can be protected. There are no concrete public interest arguments in the judgment of Lord Wilberforce [42]. He illustrated the scepticism of the court, although he purported to give reasons why this restraint

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354, 398, 407, 408 but it must be seen in the light of his view of the role of the doctrine; Treitel 411; Whish *Stair Encyclopaedia* 1213 criticised Texaco; Cf Grunfeld 64 on the problem of actual and economic consequences.

33. Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 827.
34. Treitel 411; Atiyah 337-338.
35. Anson 334; Schoombee 151; Atiyah 347 on the problems here.
36. Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 138.
37. Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 826; United Shoe Machinery Co of Canada v Brunet [1909] AC 330 at 344 although the court was probably not concerned with substantive issues.
38. Treitel 411; Supra 3.6.2.
39. Dickson v Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 574; See also Koh 73.
40. The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 690.
41. The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 695.
42. The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 707.

was contrary to the public interest [43]. Lord Wilberforce expressed doubts about accepting the argument that the restriction would cause a reduction of pharmacies [44].

Schoombee [45] contended that the courts should look at economic rather than ethical issues. Heydon [46] criticised *Texaco* for the narrow view taken of economic arguments in the case. He suggested that the contentions uttered in this case were rather tenuous, and that the court went too far in its suspicions of economic arguments. Nevertheless, the criticism of both authors must be viewed against the backdrop of the overly wide view which they take of the purpose of the restraint of trade doctrine [47]. Judicial criticism of economic arguments will probably prevail.

But even juridico-economic arguments should only play a limited role here. The contract denier should mostly be restricted to freedom of work contentions. It will cloud the focus of the doctrine if the public interest requirement is used for more ambitious purposes.

Courts have accepted, in some cases, that a restraint could be ineffective in terms of the public interest requirement because the restraint of trade doctrine was, or was also, an anti-monopoly doctrine [48]. However, judges have been conservative. They have mentioned that a restraint of trade clearly aimed at establishing a pernicious monopoly will be ineffective even if it is reasonable between the parties [49]. The exclusion of minor competitors or minor potential competitors will not be sufficient because it will not generally have a tendency towards monopolisation [50]. In sale of goodwill cases a restraint could probably only be considered ineffective on this ground if it was

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43. See the reduction of pharmacies issue The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 707; Chitty 1199 although the author took it too far when he stated that this will mean that the public interest requirement will play no role at all; Cf the discussion of Heydon 260.
44. Heydon McGill 350.
45. Schoombee 142.
46. Heydon *McGill* 352-353, Heydon's enthusiasm 350ff for such arguments is misplaced.
47. See supra 3; See especially the arguments of Schoombee 151; Heydon ibid.
48. Nordenfelt 561 read with 564 monopoly notions played a role in Lord Macnaghten's laying down of a second requirement, Stressed by Blake 687; Cf Spencer v Marchington [1988] IRLR 392 at 396; Anson 324; Heydon 25ff, See also his discussion of the problems with monopoly arguments 29ff; Spowart Taylor & Hough 748; Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 240.
49. E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 305; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 195; Wickens v Evans (1829) 3 Y & J 318 at 329 and 320 the exaggerated liberalism of the court in this case will probably not be followed today; Chitty 1199; Lubbe and Murray 261; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 827-828 and this answers the criticisms of Chitty 1199 mentioned supra; Anson 329-330; Heydon 30 accepted that the courts took a narrow view of combinations. The definition of Heydon 224 taken from AL Corbin *Corbin on Contracts* vol 6A s 1413 283 and the dictum taken from the judgment of Brandeis J in Chicago Board of Trade v US 246 US 231 at 238 on when a restraint will be against public interest for monopolistic reasons is too wide; See Christie *Encyclopaedia* 599 with reference to Attorney General of Australia v Adelaide Steamship Co [1912] AC at 796; Shell Co of SA Ltd v Gerrans Garage (Pty) Ltd 1954 (4) SA 752 (G) 757, 758; Christie 441.
50. Heydon 172.

part of a scheme aimed at concentrating business in a few (normally the buyer's) hands, and even then the courts will probably be reluctant to strike down the restraint [51]. A narrow view has even been taken in the combination cases [52]. In *Witwatersrand Steel* [53] Ramsbottom J looked at the question whether the combination constituted a pernicious monopoly. The court took a strict view of pernicious monopoly. It was submitted that the combination would only be illegal if it was calculated to enhance prices to an unreasonable extent. The court again accepted that protection against cut-throat competition would be important in showing that the combination was not illegal.

The role which monopolies have played within the doctrine is now theoretically paradoxical. It is no more than an anachronism. It is predicted that monopoly arguments under the public interest rubric of the restraint of trade doctrine will be continuously reduced. Monopolies must be controlled, but the restraint of trade doctrine is an unacceptable mechanism for doing so. Competition will today mostly be protected by more refined mechanisms [54].

Collinge [55] averred that monopoly arguments were not properly considered because of a 19th century belief in freedom of contract. But his view is coloured by an incorrect view of the principles underlying the doctrine. The anti-monopoly issue is actually a hangover of the 19th century. The doctrine has developed much but the monopoly elements have become stultified. Monopoly arguments will be acceptable if they can be shown to relate to freedom of work arguments that have not been discounted in terms of the reasonableness test. But they should not play any role beyond this.

5.2. Freedom of work-related public interest arguments on which the covenantor may rely

The most important public interest arguments for the contract denier will concern freedom of work issues. Many arguments concerning this type of public interest have come before the courts.

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[51]. Heydon 200 with reference to Toby v Major (1899) 43 Sol Jo 778 but see the criticism.
[52]. North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 471-473; Adelaide Steamship 795-796; Christie 441.
[53]. Witwatersrand Trustee (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140 at 147ff.
[54]. Cheshire Fifoot and Furmston 415; Chitty 1199; Collinge 411, 423; Korah *JBL* 254; Heydon *McGill* 352, 354, 357 stated that the doctrine can be a supplement and partial substitute for anti-trust legislation but it is not acceptable; Scott Robinson 161 accepted that legislation will now play an important role in promoting public interest; For more effective legislative solutions to these problems see: Anson 330-331, Cheshire Fifoot and Furmston 415-417, Chitty 1199, 1214, 1236, Collinge 423, Treitel 414-415, Wedderburn 152-153; Whish *Stair Encyclopaedia* 1215 there are still some lacuna in legislation though.
[55]. Collinge 410.

Hardship to third parties, through interference with the right to work, must be considered under the public interest leg of the restraint of trade test [56]. The interests of employees who are the object of anti-poaching contracts - restraints where the covenantor agrees not to employ employees of someone else [57] - will have to be protected by utilising the public interest requirement [58]. A restraint may be contrary to public interest if it merely interferes with the interests of a particular outside group even if the restraint is not contrary to the interests of society as a whole [59]. Sales [60] submitted that this will best be dealt with under the reasonableness inter partes rubric, and that the cases sometimes tried to accommodate too much under reasonableness *inter partes* [61]. But this cannot be accepted.

These cases should fall foul of the public interest requirement unless it can be shown that they are reasonable towards third parties. The restraint will be reasonable, in this public interest sense, if it goes no further than the protection of legitimate proprietary interests vis-à-vis such third parties [62]. The courts have emphasised that the restraint must not exceed the protection of trade secrets [63] or customer connections [64].

Public interest will here be relevant where the restraint clearly interferes with a third party's ability to work, and the wide public interest arguments mentioned by Sales will probably be considered to be too tenuous [65].The consequences of this cannot be that proprietary interests should now be protected vis-à-vis all third parties whose ability to work may be interfered with because of a

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56. Treitel 413-414.
57. Although the cases concerned combinations: Mineral Water Bottle Exchange and Trade Protection Society v Booth [1887] 36 Ch 465, Chitty 1232; Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 126; Cf the discussion of the cases Gurry 217-218; Nisbet v Edinburgh and Districts Aerated Water Manufacturers' Defence Association Ltd (1906) 14 SLT 178 at 179; See also Davies v Thomas [1920] 1 Ch 217 especially the unequivocal approach 226, [1920] 2 Ch 189 at 195.
58. Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 120.
59. Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 127; Treitel 413; Heydon 266-267 and the discussion of Kores where considerable support for this notion is found; Walker 186.
60. Sales 615-616.
61. See the criticism: Esso 300, 319, Cf Wedderburn 150, Smith & Wood 137, 140, Walker 193; The wide remark of Heydon 52 must be viewed within this context.
62. Cf Chitty 1232.
63. Mineral Water Bottle Exchange and Trade Protection Society v Booth [1887] 36 Ch 465 at 471, 472; Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 122; See Collinge 422.
64. Nisbet v Edinburgh and Districts Aerated Water Manufacturers' Defence Association Ltd and others 1906 14 SLT 178 would probably only be in the public interest if salesmen carters were restricted from working in the area in which they were previously employed; Smith & Wood 137, 140 accepted that customer connections and trade secrets can be protected here.
65. Sales 608-609; Russel v Amalgamated Society of Carpenter's and Joiners [1910] 1 KB 506 at 516 is too wide; The courts will probably be reluctant to accept wider public interest arguments like those mentioned in Kores a quo [1957] 1 WLR 1013 at 1019; See Heydon 248 took an incorrect view of underlying principles; Cf Mineral Water Bottle Exchange and Trade Protection Society v Booth [1887] 36 Ch 465 at 471 and especially 472 where the court apparently emphasised the freedom of third parties to work.

restriction. However, the parties should not grab by indirect means what they cannot have directly [66]. This strict application of the restraint of trade doctrine for the protection of third parties will only have a very limited scope.

Several possibilities will accordingly exist in non-poaching restraints whether in employment or combination contracts, and it will perhaps be useful to summarise them:

- In cases where non-poaching restraints are in employment contracts [67], the connections between employers and employees may be protected as proprietary interests. In such cases only those employees over whom the covenantor has influence through his previous employment may be the object of restriction.
- In non-poaching restraints in combination agreements, the wider interest in having a stable workforce can also sometimes be protected. This wider interest in the general ability of an employer to maintain a stable and competent workforce will merely constitute a commercial interest. In a post-employment non-poaching restraint this interest cannot be protected without more.
- The importance of the public interest requirement will be enhanced where non-poaching restraints are concluded. Proprietary interests will, mostly, have to be protected vis-à-vis third parties to save the restraint from being contrary to public interest.

Treitel [68] contended that public interest will come into play where the public is deprived of a skill that is particularly important from a public interest perspective, even if the restraint is reasonable as between the parties [69]. The interest which the public may have in dealing with a particular individual will not be protected. The courts are here concerned with cases where the restriction of that individual will necessarily also take away the service he provided [70]. It is doubtful whether this

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66. Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 126; Heydon 248; Treitel 413; This should also be remembered when too wide statements like the one in Russel v Amalgamated Society of Carpenters and Joiners [1910] 1 KB 506 at 516 is considered; Cf also Davies v Thomas [1920] 2 Ch 189 at 204 the court found that restrictions on third parties were not in restraint. But it also stressed that the term would not be in restraint of trade if concluded directly with the third party and the court looked at a clause that was mooted between such parties; See the emphasis that was placed on this point by Wedderburn 150.

67. See supra Ch 6.17.

68. Treitel 410-411, Treitel (1966) 2nd ed 322 and 323; Spowart Taylor & Hough 748; Cf Blake 684-685 he did not clearly distinguish this from reasonableness; Cf Giles v Hart (1859) 1 LT 154 at 155 where the court apparently did not regard this issue as important.

69. But see Heydon 172. If there is a wide shortage of the particular skill it will also be possible to practise it outside the restricted area.

70. It will not be enough to show that the employee was highly skilled Whittaker v Howe (1841) 3 Beav 383 294; Nordenfelt 567 with reference to Davis v Mason (1793) 5 Term Rep 118 infra, 574; Cf Lewis & Lewis v Durnford (1907) 24 TLR 64 at 65 and the reasonableness issue; See the criticisms of Wyatt v Kreglinger and Fernau [1933] 1 KB 793 and Bull v Pitney-Bowes Ltd [1967] 1 WLR 273: Anson 327-328, Cheshire Fifoot and Furmston 404-405, Chitty 1203, Notes (1933) 49 *LQR* 465 especially 467, Trebilcock 108, Treitel 410, The Australian Howard F Hudson Pty Ltd v Ronayne (1972) 46 ALJR 173; Dillon LJ in Alec Lobb (Garages) Ltd v Total Oil (Great Britain)

public interest factor will ever be sufficient in cases where the covenantor is restricted by an otherwise reasonable restraint that does not exceed restricting *dealings* with customers of the covenantee.

In *Nicholls* [71] Lord Langdale MR accepted that courts have been reluctant to grant a remedy for the enforcement of a restraint on a professional. Such restrictions might deprive third parties of the services of those in whom alone they had confidence. But the court finally accepted that the difficulty has been passed over, and it seems that the issue has also not been regarded as important in terms of the restraint of trade test:

- It has been accepted that a medical man may be restricted even though the public will be deprived of his services [72].
- In *Oswald Hickson Collier* [73] Lord Denning stressed that a restraint against dealing with clients would prohibit the solicitor from continuing his confidential relationship with clients. He continued that this would be particularly problematic in cases of ongoing litigation. Yet the courts immediately started to backtrack. In *Edwards* [74] Dillon LJ noted that *Oswald Hickson Collier* concerned an interlocutory injunction. He interpreted the dictum of Lord Denning narrowly and placed stress on the more careful judgment of Kerr LJ. Thus, he concluded, the judgment merely stated that there was a serious issue to be tried on this notion. The Privy Council in *Bridge* then sounded the death knell for this thesis [75]. It was stated that there is much contrary authority [76], that many contracts would fall within this class, and that the result would accordingly be too far reaching. It was stressed that a professional man was generally free to end his relationships with clients and that there was

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Ltd [1985] 1 WLR 173 at 179, See the Case Note (1985) LQR 308; Kales 201 took a too optimistic view regarding the ability of others to perform the tasks of the covenantor, Dempsey v Shambo 1936 EDL 330 although it was rejected on other grounds; Kin v Sharnek 1959 (3) SA 534 (E) 536; Magna Alloys 904 although the criticism of the court a quo is unjustified. The court a quo probably merely intended to say that the restraint was unreasonable and therefore against public policy.

71. Nicholls v Stretton (1843) 7 Beav 42 at 44.

72. Davis v Mason (1793) 5 Term Rep 118; Eastes v Russ [1914] 1 Ch 468 at 482; Routh v Jones [1947] 1 All ER 179 at 182; Kerr v Morris [1987] Ch 90 at 106-107; Cf Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 and the reasonableness questions surrounding choice of a doctor especially on the choice of third parties 1111, 1116; See Trebilcock 109-119; Lewin v Sanders 1937 SR 147 at 151; Nathan 42-43.

73. Oswald Hickson Collier & Co v Carter-Ruck [1984] AC 720 at 723; Canadian case of Sherk v Horowitz (1971) 25 DLR (3d) 657 (Ont HC) 678 discussed Heydon *McGill* 352.

74. Edwards v Worboys [1984] AC 724 especially at 727 and 728. See also how it was distinguished ongoing litigation would not be affected here.

75. Bridge v Deacons [1984] AC 705 at 719-720; Treitel 410; Cf also George Walker & Co v Jann 1991 SLT 771 at 772 where this aspect of the Bridge decision was mentioned by the court; Dallas McMillan & Sinclair v Simpson 1989 SLT 454 at 456 and the arguments of counsel. The issue was not discussed by the court, 457, Cf MacQueen 345 who suggested that there might have been a public interest argument here but the court was dealing with reasonableness.

76. Spowart Taylor & Hough 745-746.

no reason why he could not be allowed to end them because of a restraint. It was finally emphasised that the clients were clients of the firm and not of the particular solicitor [77].

It has been accepted that it is not against public policy for professional men to sell their goodwill and recommend successors to customers. Lord Ellensborough in *Bunn* accepted this point [78], and the principle was also accepted in English Equity, albeit with some reluctance [79]. It has now been confirmed in *Allied Dunbar* [80].

Woolman [81] contends that courts may accept that a restraint on a medical doctor will be against public interest because the court will want to ensure the best possible medical care. In *Allied Electric* [82] the court assumed that it was probably not in the interest of the public to enforce a restraint on a technically skilled person when there was a shortage of such people in South Africa at that stage. But it is suggested that more concrete arguments on the facts of a particular case will be required. In *Allied Electric* the court finally decided the case on the basis of reasonableness, and it is suggested that it should not be enough to show merely that there is a general shortage of skilled persons, although it can perhaps in future play an attitudinal role [83]. The courts must look at the activities being restricted in the particular case [84].

In *KWV* [85] the court held that a restraint may be against public policy if it is prejudicial to consumers with regard to a legitimate article of commerce (although the issue was not developed, as the court found that the restraint was wider than necessary for the protection of interests). But it will probably have to be shown that such goods or services cannot be reasonably acquired from someone who is not a party to the contract. It will not weigh as heavily with the court today, as it did in *Collins v Locke* [86], if the restraint merely restricts the public's freedom of choice.

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77. But see the criticism of Spowart Taylor & Hough 748-750 there is much in the suggestions of the authors.
78. Bunn v Guy (1803) 4 East 190 at 194ff, See Heydon 20, 182-183.
79. Candler v Candler (1821) Jac 225; Bozon v Farlow (1816) 1 Mer 459; Whittaker v Howe (1841) 3 Beav 383 although it was in the end allowed here; Gilfillan v Henderson (1833) 2 Cl & Fin 1; Thornbury v Bevill (1842) 1 Y & C Ch Cas 554; Heydon 20, 182-183; Cf on the view of Scots courts about goodwill in sale of doctor practices Rodger v Herbertson 1909 SC 256.
80. Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 at 65.
81. Woolman 256 with reference to the facts of Anthony v Rennie 1981 SLT (Notes) 11.
82. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 332, Cf Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 499 where the court held that the interest of the public separately from reasonableness would not be damaged by the restriction on an estate agent.
83. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 493 where the court correctly found an even more restricted statement to be too wide.
84. Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 240 is not entirely acceptable. It is not acceptable to say that the court can never strike down a restraint where there is a shortage of a particularly important skill.
85. KWV van ZA Bpk v Botha 1923 CPD 429 at 437.
86. Collins v Locke (1879) 4 App Cas 674 at 688.

However, there might still be cases where this issue will be conclusive. Anson mentions the example of a scientist with particular skills who is restricted from activities important for society [87]. In *Stewart Wrightson* [88] the court seems to have been prepared to regard a restraint as contrary to public interest if the covenantor could prove that the service he provided could not be performed by anyone else.

That the public will be deprived of the services of a particular individual may be of some importance on a second level. Freedom of choice of particular services might be important for reasons that are not market-related:

- In *Sir WC Leng* [89] the court accepted that it was not in the public interest to restrict a reporter, because it is important to have many competing sources of information. But the restraint here was also unreasonable inter partes, and it is not clear what weight the court would have otherwise placed on this public interest issue. It is suggested that it would probably have been merely attitudinal.
- In *Aetiology Today* [90] teachers working for the applicant private school started another school in competition with the applicant. One of the interdicts for which the covenantee asked was that respondents should be prohibited from registering any pupil of the applicant's school on the basis that it would constitute unlawful competition. The court refused to accept this on the basis that it was in accordance with public policy that parents should have choice with regard to the school to which they sent their children [91]. The respondents were furthermore placed under restraints to the effect that they would not "solicit any ... clients or employees". In this respect the court found that it was not proven by the covenantors that the restraint was contrary to public interest. However, the notion of choice in education may play an attitudinal role in some cases.

It may be of importance that the covenantor will become a burden upon society. In *Nordenfelt* [92] the court did not show much sympathy for such an argument, as the covenantor was paid a large sum for the restraint. Moreover, many of the elements of this aspect of the freedom of work

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87. Anson 328.
88. Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 406.
89. Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 774; Cf also on newspaper issues Dempsey v Shambo 1936 EDL 330.
90. Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 (1) SA 807 (W).
91. Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 (1) SA 807 (W) 817ff in the context of unlawful competition.
92. Nordenfelt 574.

principle will be discounted in terms of the reasonableness inter partes rubric. Hence this factor will probably play an attitudinal role.

Finally, a contract may be contrary to public interest in terms of a statutory regime [93]. In *Kerr v Morris* [94] the court considered a restraint on a partner to an NHS medical practice and found that the statutory regime here did not transform the restraint into one that was contrary to public interest, though it gave patients a right to be served by a particular doctor [95]. In *George Walker & Co v Jann* [96] the question was whether a statutory duty of a Messenger at Arms would impact upon the acceptability of a restraint. Lord Cullen decided that the public interest leg of the restraint of trade doctrine did not come into play here. He stated that the restraint of trade doctrine "is concerned with the effect on the public of the restriction on the freedom to trade". He continued that no attempt was made to pursue this line of attack. The clause was still upheld and the reasons for holding the contract to be in accordance with public policy would also have been sufficient to show that the public interest requirement in terms of the doctrine was satisfied. But perhaps the public interest requirement of the restraint of trade test should also be shaped by legislation, and perhaps it could have been considered under the public interest requirement of the restraint of trade test.

6. Public interest and the enforcer of the restraint

Authorities normally only mention that public interest can lead to a restraint being ineffective even though it is reasonable as between the parties. But can a restraint be enforced even if it is not reasonable in the interests of the parties? Nienaber JA in *Basson* [97] accepted that it would probably be possible for public interest to play this reverse role. This seems to be acceptable. But the court will be hard pressed to find that public interest is so important. It is difficult to think of examples. Otto [98] mentioned the case of the government employee working on a highly secret programme for the government. However, the restraint that will restrict the disclosure of information in such a

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93. This is something different from a contract that is contrary to a statute Kerr v Morris [1987] Ch 90; Cf Heydon *McGill* 352 and the discussion of Sherk v Horowitz (1971) 25 DLR (3d) 657 (Ont HC); See Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 276 and the consideration of legislation; Cf BMTA v Gilbert [1951] 2 All ER 641 at 644 and the government approval argument.

94. Kerr v Morris [1987] Ch 90 at 104-106, 113, 116 overruling Hensman v Traill (1980) 124 Sol Jo 776.

95. See generally on NHS patients and restraints McBryde 600, Whitehill v Bradford [1952] Ch 236, Macfarlane v Kent [1965] 2 All ER 376; Anthony v Rennie 1981 SLT (Notes) 11 at 12 where this was not even considered.

96. George Walker & Co v Jann 1991 SLT 771 at 773.

97. Basson v Chilwan 1993 (3) SA 742 (A) 767.

98. Otto 211; LJ van der Merwe "Die funksie van die reels ter beskerming van handelsvryheid" 1988 *TSAR* 252.

case will also be reasonable inter partes [99]. Thus public interest will probably only play an attitudinal role here.

- The courts have accepted that a covenant in restraint of trade is more appropriate where it is placed on a person who is not subject to any professional controls [100]. This may play some role where the restriction is aimed at organising the industry.
- It has also been contended that the public has a strong interest in law partnerships taking on new partners, and that wider restrictions should be allowed if they are aimed at facilitating this process [101]. These arguments might be of some importance where a restraint is aimed at pensioning off employees at a reasonable age to allow young recruits to take their places [102].

Arguments regarding the economic effect of a restraint may be of some significance. The purpose of the doctrine is not to produce the utmost economic advantage. But in restraint of trade cases, it must be determined whether freedom of trade outweighs the reasons for upholding freedom of contract. Some economic arguments might still be important in showing that circumstances militate against protecting the correctly interpreted principle of freedom of trade in a particular case.

However, the courts will probably still find general economic arguments difficult to deal with [103]. Hence, they will mostly still decide these economic issues on the basis of principles internalised in the legal system. Even these juridico-economic arguments will have to be balanced against the strong support which the legal system gives to freedom of work. Ungoed-Thomas J in *Texaco* [104] maintained that freedom of trade should be protected subject to "reasonable limitations which conform with the contemporary organisation of trade". He relied on Lord Wilberforce in *Dickson* [105], where it was stated that it is "the normal proposition that the public has in the absence of countervailing considerations an interest in men being able to trade freely". Moreover, concrete countervailing economic arguments will be discounted in terms of the reasonableness inter partes leg of the test. Yet, it is still possible that some economic arguments might play an attitudinal role under this heading:

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99. Kerr *Tribute* 195.
100. Scorer v Seymour Jones [1966] 1 WLR 1419 at 1423; Chitty 1207.
101. Fitch v Dewes [1921] 2 AC 158 at 165-166; Bridge v Deacons [1984] 1 AC 705 at 718-719; Treitel 410; McBryde 599; Woolman 256.
102. Treitel 410.
103. Supra 5.1.
104. Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 829.
105. The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686; See also on the problems with public interest supra 3.

- It will be relevant if a restraint will prevent overstocking of a skill in a certain area [106].
- Kales [107] argued that a court will take a more favourable view of a restraint in a sale of business that is aimed at averting destructive competition. This may be taken into consideration by the court although it will probably often be difficult to determine when competition will be of this nature.

7. Status of public interest arguments

The public interest requirement will not have a wide sphere of operation as a second and separate test. But it cannot be abandoned, as it may still play such a role in extraordinary cases while it will also fulfil many other functions.

Courts often consider broader public interest issues without regarding them as conclusive. Thus the public interest requirement will probably also play a dual role. Sometimes public interest factors will be so imperative that they will override the reasonableness test. At other times such factors will merely be important for determining the attitude of the courts towards a specific restraint [108]. On the second level considerable interaction between the public interest requirement and the reasonableness requirement will exist [109].

In *Herbert Morris* [110] the court held that public interest factors ought not to be considered in determining reasonableness inter partes, but that should not exclude public interest, as a separate rubric from impacting on the attitudes of the courts towards reasonableness as between the parties.

The public interest requirement rightly provides the restraint of trade doctrine with open-ended development possibilities. Public policy is in constant flux, and this can often be translated through the public interest requirement. The public interest test is a reminder of the broad public policy basis of the doctrine, and changes to the doctrine will often be effected by utilising it.

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106. Mitchel v Reynolds (1711) 1 PWms 181.
107. Kales 206.
108. Cf Heydon 174, Blake 650 show some sense of this.
109. Lubbe and Murray 261 also seem to foresee the possibility of such interaction.
110. Herbert Morris 708.

Chapter 11

Onus rules in the restraint of trade doctrine

Table of Contents

1. Onus and its different aspects

Writers and courts so emphasise onus that it has sometimes dwarfed the substantive aspects of the doctrine [1]. This is not acceptable. But onus remains a difficult concept that operates on many levels.

2. The evidentiary onus

Onus can firstly be explained according to traditional law of evidence principles. The onus bearer will have a burden to start adducing evidence [2], and the case will be decided against him if the facts are not conclusive one way or the other. Hence this type of onus will not be of much importance in restraint of trade cases [3]. No specific facts have to be proven. Reasonableness can often be determined on the facts before the court [4], although there might be exceptional cases where onus will be conclusive.

3. The phantom onus

The "phantom onus" [5] is a more important concept. The onus may also have an impact on the attitude of the court towards the restraint [6]. The restraint of trade doctrine is an area of law where courts have considerable freedom when they apply law to facts. The distinction between law and facts becomes opaque, and this has led to a considerable fusion of the onus and the general attitude in the application of law and principles. The concept of onus is used by practical lawyers who have difficulty in expressing attitude notions in terms of existing legal jargon. It lies in the no man's land between the evidentiary onus and the principle that direct evidence as to reasonableness or unreasonableness will not be accepted [7]. Hence a court will be more reluctant to find for a party who bears the onus when it applies law to facts.

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1. Kahn 391; Schoombee 143; Du Plessis and Davis 98; Van der Merwe 157 n128 the onus rule was called a doctrine but it is not correct. The onus rules form part of a doctrine.
2. Heydon 42.
3. Heydon 40.
4. Eastes v Russ [1914] 1 Ch 468 at 475, 487; Herbert Morris 699, 707; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 562; Routh v Jones [1947] 1 All ER 758 at 763; Lord Pearce in Esso 323-324; This is also inherent in Esso per Lord Hodson 319. But see the more important aspects infra 5.1., See Anson 322, Chitty 1199; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558, 574 at 567 and especially 573; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 822; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 360; Commercial & Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 232; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 331.
5. Schoombee 143.
6. See supra Ch 9.1 on attitude.
7. Tallis v Tallis (1853) 1 E & B 391 at 413; Mallan v May (1843) 11 M & W 653 at 668; Haynes v Doman [1899] 2 Ch 13 at 25; Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 368; Dowden & Pook Ltd v Pook [1904]

It is difficult to find any clear expressions of the phantom onus in the cases. The phantom onus has surreptitiously entered and left the minds of lawyers without giving them an opportunity to identify it. There are statements that inadvertently deny its existence. In *Basson* [8] Botha JA stated that "The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general". But there is more acceptable authority that seems to point the other way. Lord Shaw of Dunfermline in *Herbert Morris* [9] clearly distinguished the onus to put special circumstances before the court (the factual onus), but the court also stated that "if such facts and circumstances be relevantly set forth, the onus of proof is upon the party averring them to satisfy the Court of their sufficiency to overcome the presumption [of ineffectiveness]".

It is often generally stated that there is an onus to show reasonableness. Most of these dicta are probably shorthand and imprecise expressions of the factual onus. But these may also in some cases be explicit recognitions of the phantom onus. The criticism by Kahn [10] of the use of such expressions in South Africa must accordingly be rejected, although there are also cases where more narrow statements have been made [11].

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1 KB 45; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 766 in the argument of counsel, 770, 772; United Shoe Machinery Co of Canada v Brunet [1909] AC 330 at 341; Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 797; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 470, 471, 475; SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 426; Mason 732-733; Palmolive Co (of England) Ltd v Freedman [1928] 1 Ch 264 271; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 602; Putsman v Taylor [1927] 1 KB 637 at 642; Connors Bros Ltd v Connors [1940] 4 All ER 179 194; Routh v Jones [1947] 1 All ER 179 at 183; Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1954) 71 RPC 7 at 11; Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 120; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1371; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 567; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 402; Heydon 39, 44-47; Anson 321; Cheshire Fifoot and Furmston 405-406; Chitty 1200; Treitel 412; Christie *Encyclopaedia* 587; See Gloag 575; McBryde 603; Trimble v Jameson & Co (1903) 24 NLR 53 at 61 with reference to Tallis; Durban Rickshas Ltd v Ball 1933 NPD 479 at 490, 493; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 171; National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1102; But see Magna Alloys 902, 905 see the criticism Schoombee 150, See the more careful view 897; Cf Mouchel v William Cubitt & Co (1907) 24 RPC 194 at 201 is too wide.

[8]. Basson v Chilwan 1993 (3) SA 742 (A) 776-777; Gero v Linder 1995 (2) SA 132 (O) 135.

[9]. Herbert Morris 715; Apparently Esso 323-324 see infra; Cf the definition Christie 436.

[10]. Kahn 392 with reference to Van de Pol v Silbermann 1952 (2) SA 561 (A) 572, Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280; Du Plessis and Davis 99; Schoombee 143; Treitel 412; Heydon 39.

[11]. Kahn ibid relied on: Durban Rickshas Ltd v Ball 1933 NPD 479 at 493, Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140 at 150-151, Nursing Services SA (Pty) Ltd v Clarke 1954 (3) SA 394 (D) 394-395, Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 501; The view that the onus is about placing evidence before the court was also expressed in: Gordon v Van Blerk 1927 TPD 770 at 772-773, Halliwell v Laverack 1929 WLD 175 at 178, 180, New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 82-83, Aling and Streak v Olivier 1949 (1) SA 215 (T) 220, Katz v Efthimiou 1948 (4) SA 603 (O) 612-613, Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 717, 721, Ex Parte Spring 1951 (3) SA 475 (C) 478, Rogaly v

The phantom onus currently plays an important role within the restraint of trade doctrine. The duality of the concept must accordingly be borne in mind in the further discussion of onus. But the phantom onus must be related to other attitude issues. Many other aspects will also play an important role in determining the attitude of the court. The phantom onus should be a prima facie determinant of attitude. It should determine the broad and general attitude of the court towards restraints, although there are many aspects that may either displace or enhance this initial position. The general initial attitude should perhaps in future be separately and explicitly dealt with [12]. The phantom onus does not always fit in easily with the way in which the term "onus" is generally understood.

4. The jurisdictional incidence of onus

The onus to determine whether a restraint falls within the doctrine will, in all three legal systems, probably be on the party who wants to rely on the doctrine. There are no cases where this issue has been pertinently decided but the authorities point in this direction, and it is the most acceptable theoretical solution [13]. This will not be a problem in the classic cases, but it might be a hurdle where the contract contains one of the newer restraints.

In the *Encyclopaedia* [14] it is stated that the onus to show the ineffectiveness of a restriction which operates during employment is on the party who alleges ineffectiveness. This cannot be accepted, but an onus to show that the restriction falls within the doctrine will rest on the contract-denier in such a case.

Weingartz 1954 (3) SA 791 (D) 792, SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 787-788; Emphasis was also placed on the proof of facts in: Shell Co of SA Ltd v Gerrans Garage (Pty) Ltd 1954 (4) SA 752 (G) 755, Nel v Drilec (Pty) Ltd 1976 (3) SA 79 (D) 85, Cf Groenewald v Conradie 1957 (3) SA 413 (C) 415, National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1099, Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 499; See also the English cases that emphasised special circumstances: Stuart & Simpson v Halstead (1911) 55 Sol Jo 598, Herbert Morris 700, 707, 715 but see Lord Shaw supra, McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 572 at 572, Bowler v Lovegrove [1921] 1 Ch 642 at 650, Palmolive Co (of England) Ltd v Freedman [1928] 1 Ch 264 at 271, Connors Bros Ltd v Connors [1940] 4 All ER 179 at 192, Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 567, Cheshire Fifoot and Furmston 406, Chitty 1200.

[12]. See supra Ch 9.5.

[13]. Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1954) 71 RPC 7 at 11; Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 613; Although not conclusive Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 695; See Heydon 44; Dawson 459 can only be so understood.

[14]. Christie *Encyclopaedia* 596.

In *National Chemsearch* [15] Botha J said that "There are many kinds of contracts operating effectively 'in restraint of trade' to which the notion that they are prima facie void is never applied, even in English law". He contended that this position is illogical in English law, because it is there accepted that some restraints are prima facie void. But he overlooks the first stage of onus. It will often be necessary to show that an agreement falls within the scope of the doctrine, in the legal sense, before the principle that the contract is prima facie ineffective will apply.

5. The substantive incidence of onus

When it comes to onus, a schism between South Africa and the other legal systems has appeared. The discussion of this legal system will have to be separated, and the reasons underlying the distinction will thereafter be discerned.

5.1. England and Scotland

A restraint will now be prima facie ineffective [16]. It is settled in Scots and English law - although courts on occasion took a different view - [17], that the onus to prove that the restraint will be

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[15]. National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1099-1100.

[16]. Mitchel v Reynolds (1711) 1 PWms 181 at 191-192, But cf Davies v Davies (1887) 36 ChD 359 at 397-398; Mallan v May (1843) 11 M & W 653 at 665 but see Davies v Davies (1887) 36 ChD 359 at 383 thought there was no presumption either way; Sainter v Ferguson (1849) 7 CB 716 at 730; Nordenfelt 565 but see supra; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 309; Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 368 on general restraints; Beetham v Fraser (1904) 21 TLR 8; Stuart & Simpson v Halstead (1911) 55 Sol Jo 598; Herbert Morris 715; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 581; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 26; Bowler v Lovegrove [1921] 1 Ch 642 at 650; Pellow v Ivey (1933) 49 TLR 422 at 423; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 946, 957, 958, 966; Dickson v Jones [1939] 3 All ER 182 at 187; Triplex Safety Glass Co v Scorah [1938] Ch 211 at 215; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 192, 195 but see supra; Routh v Jones [1947] 1 All ER 179 at 181; M & S Drapers v Reynolds [1956] 3 All ER 814 at 815, 819; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 343, 344; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 238; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 12; Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 544; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1232; Peyton v Mindham [1972] 1 WLR 8 at 14; Greig v Insole [1978] 3 All ER 449 at 495; Bridge v Deacons [1984] 1 AC 705 at 713, Referred to George Walker & Co v Jann 1991 SLT 771 at 772 and see the criticism infra, Woolman 257 cannot be accepted; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; R v General Medical Council, Ex parte Colman [1990] 1 All ER 489 at 509 refused to regard powers exercised in terms of legislation as prima facie contrary to public policy; Watson v Prager [1991] 1 WLR 726 at 750; Cheshire Fifoot and Furmston 397, 399, 400, 404; 412; Chitty 1190, 1197; Collinge 411; Farwell 66; Treitel 401; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452; Christie *Encyclopaedia* 587; See McBryde 603 argued that it was not settled. He relied on: Anthony v Rennie 1981 SLT (Notes) 11 at 12 where Whitehill v Bradford was quoted but Whitehill probably did not intend such a wide point, Fitch v Dewes but this case has been rejected; Walker 184-185; Contra Woolman 253ff but see infra.

[17]. Tallis v Tallis (1853) 1 E & B 391; Rousillon v Rousillon (1880) 14 ChD 351 at 365; Mills v Dunham [1891] 1 Ch 576 at 586 and see also 587; Nordenfelt 566, See Connors Bros Ltd v Connors [1940] 4 All ER 179 at 192, Gooderson 413. But the famous quote Nordenfelt 565 might create a different impression: Heydon 37, Trebilcock 70-71 and see more carefully 45, Mason 733 in Eastes v Russ [1914] 1 Ch 468 at 475 although it can also be differently understood; Swaine v Wilson (1889) 24 QBD 252 at 257; Badische Anilin und Soda Fabrik v Schott

reasonable is on the person who asserts the contract, while the denier will have to show that the restraint is against public interest once reasonableness is proved [18].

Segner & Co [1892] 3 Ch 447 at 451; Haynes v Doman [1899] 2 Ch 13 at 17, 30-31; Cf Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 771-772 felt that the onus for reasonableness of a restraint would be cast on the plaintiffs because the restraint was imposed on a minor; Osborne v Amalgamated Society of Railway Servants [1911] 1 Ch 540 at 556 but see 553, 565; Caribonum Co Ltd v le Couch (1913) 109 LT 385 at 388-389; Continental Tyre and Rubber (GB) Co Ltd v Heath [1913] 29 TLR 308 at 309-310; See also Eastes v Russ [1914] 1 Ch 468 Cozens-Hardy LJ 475 left the issue open although he was critical of it, Swinfen Eady LJ 487-488 also did not give a final answer but he was even more critical of the notion that the onus of proving reasonableness could be on the enforcer in cases of partial restraints; Fitch v Dewes [1921] 2 AC 158 at 162; Palmolive Co (of England) Ltd v Freedman [1928] 1 Ch 264 at 271 did not decide it but was critical of the view expressed in the court a quo; Cf Connors Bros Ltd v Connors [1940] 4 All ER 179 at 192 where the court stated that the reasonableness onus in sale of goodwill cases need further elucidation, Heydon 40; Heydon 37; Trebilcock 23; Treitel *The law of contract* (1987) 345ff; Van der Merwe 157; Christie *Jur Rev* 293; Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1115; Cf Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868 the onus was placed on the defender but it concerned the issue whether the contract had been lawfully terminated.

[18]. Cf Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 796 on the onus to show that a contract establishes a monopoly, See North Western infra 472-473, 480; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 470; Mason 733, But see Eastes v Russ 488, Gooderson 413, Cf Lord Shaw in Mason 741 quoted the contrary opinion in Tallis v Tallis 740 but some statements may also be differently interpreted, Cf Lord Moulton 742 did not clearly choose sides although he couched the question here in words which indicate that the onus should be on the denier; Herbert Morris 700, 707, 715; Great Western and Metropolitan Dairies Ltd v Gibbs (1918) 34 TLR 344 at 345; Attwood v Lamont [1920] 3 KB 571 at 584-586, 587-588; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 572, 589; Rawlings v General Trading Co [1921] 1 KB 635 at 644 on the second leg; Bowler v Lovegrove [1921] 1 Ch 642 at 650; Putsman v Taylor [1927] 1 KB 637 at 642, 645; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 946; Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] AC 181 at 189; Empire Meat Co Ltd v Patrick [1939] 2 All ER 85 at 92; Dickson v Jones [1939] 3 All ER 182 at 187, 190; Routh v Jones [1947] 1 All ER 179 at 181; Routh v Jones [1947] 1 All ER 758 at 763, 764 although the court also considered the position where the onus is the other way; Whitehill v Bradford [1952] 1 Ch 236 at 242; Vandervell Products Ltd v MacLeod [1957] RPC 185 at 191, 194; M & S Drapers v Reynolds [1956] 3 All ER 814 at 815, 819; Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 120; Kerchiss v Colora Printing Inks Ltd [1960] RPC 235 at 238, 239; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 640, 645; Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413 at 439, See the interpretation Greig v Insole [1978] 3 All ER 449 at 496; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1372, 1374; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 139, 142; Regent Oil Co Ltd v JT Leavesley (Lichfield) Ltd [1966] 1 WLR 1210 at 1214; Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 544-545; Esso 311-312, 313, 319; 323-324, See the criticism of Korah 253 although it seems unfounded; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 567, 573; The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 707, Left open although the court was critical of these principles in professional society cases 690, Criticised 698, Left open 695; Peyton v Mindham [1972] 1 WLR 8 at 19; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 822; A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 618; Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1975] AC 571 574; Littlewood Organisations Ltd v Harris [1977] 1 WLR 1472 at 1468; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 613; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 328; Anson 320-321; Atiyah 345; Bowman 572; Cheshire Fifoot and Furmston 406; Chitty 1199, 1203; See Christie *Jur Rev* 293 with reference to Mitchel v Reynolds (1711) 1 PWms 181; Heydon 37; Farwell 66; Collinge 420; Hickling 36-37 trade union cases, Cf also Kahn-Freund 202; Trebilcock 70-71, 235-236 and the criticism; Treitel 412, 419; Winfield 327; Pratt v Maclean 1927 SN 161; In Taylor v Campbell 1926 SLT 260 at 261; Scottish Farmer's Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 151, 157; Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd 1958 SC 400 at 418; MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95 at 101; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 39; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 35; Rentokil Ltd v Hampton 1982 SLT 422 at 423; See counsel Agma Chemical Co

Although this is not always appreciated [19], the onus for the determination of reasonableness and public interest may differ. Lord Hodson in *Esso* [20] said that it will seldom arise, "since once the agreement is before the court it is open to the scrutiny of the court in all its surrounding circumstances as a question of law." However, this is not acceptable [21]. Other facts will often influence public interest, and those facts will still have to be put before the court, and the change will affect the phantom onus.

But how will the switch work? It is accepted that the onus for reasonableness will be on the enforcer while the onus for public interest will be on the denier, but this has to be refined. The entire onus will be on the enforcer, and the presumption of ineffectiveness will exist unless reasonableness as a whole is proved [22]. The enforcer will have to show that the contract is in the public interest if he attempts to argue the case in terms of public interest rather than reasonableness before the reasonableness issue has been settled. However, the onus will reverse once reasonableness is proved [23].

Woolman [24] accepted that, in Scotland, "It is an article of faith of the law of contract that restrictive covenants are prima facie void and unenforceable", but he then stated that the recent cases take a different view. He continued: "If the onus were truly against the covenantee fewer clauses should be upheld than actually occurs in practice". However, his view cannot be accepted:

- He averred that the success of a greater number of restraints in Scotland cannot be the result of improved drafting, because there are no guidelines by which drafting can be improved. But this argument is overly simplistic. There are certainly rules and principles that may guide parties to a legal restraint. Restraints are often drafted by lawyers who are influenced by past judgments.

Ltd v Hart 1984 SLT 246 at 247; Dallas McMillan v Simpson 1989 SLT 454 at 456; Christie *Encyclopaedia* 587 although no Scots cases are referred to, See also the discussion 595 although 596 is unacceptable; Gloag 570, 571; Walker 191; McBryde 603-604 but see supra; Whish *Stair Encyclopaedia* 1210, 1211.

19. Triplex Safety Glass Co v Scorah [1938] Ch 211 at 215, See Trebilcock 71 cannot be accepted infra 5.3; Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1954) 71 RPC 7 at 11; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 343; Marion White Ltd v Francis [1972] 3 All ER 857 at 862; Luck v Davenport-Smith [1977] EG 73 at 85; Bridge v Deacons [1984] 1 AC 705 at 713.

20. Esso 319; Korah *JBL* 253.

21. This view must be set against the generally wide view which Lord Hodson took of public interest see 321.

22. Heydon 270 is confusing.

23. Esso 319 seems to accept the distinction although it was stated that the reasons for it is obscure, See the criticism infra 5.3; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 328; Chitty 1199; Korah *JBL* 253; Treitel 412; The understanding of the Esso case in Basson v Chilwan 1993 (3) SA 742 (A) 761 cannot be accepted. The court was critical of the distinction but it was certainly not rejected.

24. Woolman 253ff accepted with reference to Burn-Murdoch 297 that a different approach was initially followed.

- Whether a restraint is upheld or not will depend on the facts of the particular cases. Woolman drew his conclusion on the basis of too few cases (although the courts were quite pro-freedom of contract in some of the cases relied upon). More recent decisions seem to create a different impression. Many have not been upheld since the article was written [25].

At the most the view of Woolman can be taken as a criticism of a couple of judges during a certain period, relating to the manner in which they have neglected the phantom onus or, preferably, the traditional initial preference for freedom of trade [26].

5.2. South Africa

In South Africa some courts also initially placed the onus on the party who argued against legality [27]. However, the lower courts adhered to the principle as expressed in modern English law [28]. They accepted that restraints were prima facie ineffective [29]. The onus for proving reasonableness

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[25]. MacQueen 345.

[26]. See supra Ch 9.5.

[27]. SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 371; Fenner-Solomon v Martin 1917 CPD 22 at 23; Empire Theatres Co Ltd v Lamor 1910 WLD 289 at 291; African Theatres Trust Ltd v Johnson 1921 CPD 25 at 26; African Theatres Ltd v D'Oliviera 1927 WLD 122 at 129; Kahn 396.

[28]. Gordon v Van Blerk 1927 TPD 770 at 772-773; KWV van ZA Bpk v Botha 1923 CPD 429 at 437 although the court 436-437 justified it on the facts; Estate Matthews v Redelinghuys 1927 WLD 307 at 311-312; Halliwell v Laverack 1929 WLD 175 at 178, 179, 180; Durban Rickshas Ltd v Ball 1933 NPD 479 at 481-482, 493-495, 496; Wilkinson v Wiggill 1939 NPD 4 at 12; Dempsey v Shambo 1936 EDL 330 at 334, 339; Lewin v Sanders 1937 SR 147 at 150; Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140; Vermeulen v Smit 1946 TPD 219 at 221, Schwartz v Subel 1948 (2) SA 983 (T) 987; Katz v Efthimiou 1948 (4) SA 603 (O) 612; Ex Parte Spring 1951 (3) SA 475 (C) 478; Cowan v Pomeroy 1952 (3) SA 645 (C) 649; New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 82 accepted in Brooks and Wynberg (Pty) Ltd v New United Yeast Distributors (Pty) Ltd 1936 TPD 296 at 304-305; Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 717, 721; Weinberg v Mervis 1953 (3) SA 863 (C) 865; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 172; Shell Co of SA Ltd v Gerrans Garage (Pty) Ltd 1954 (4) SA 752 (G) 755; Nursing Services SA (Pty) Ltd v Clarke 1954 (3) SA 394 (D); Rogaly v Weingartz 1954 (3) SA 791 (D) 792; Savage and Pugh v Knox 1955 (3) SA 149 (N) 155 with reference to Lindley 531; Groenewald v Conradie 1957 (3) SA 413 (C) 415; Muller v Harris 1958 (2) SA 344 (N) 347; Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 501; Kin v Sharneck 1959 (3) SA 534 (E) 536; Filmer v Van Straaten 1965 (2) SA 575 (W) 579; Berger v Osher 1965 (1) SA 558 (W) 559; Arlyn Butcheries (Pty) Ltd v Bosch 1966 (2) SA 308 (W) 310; Nachtsheim v Overath 1968 (2) SA 270 (C) 271; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 2; Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280; Wohlman v Buron 1970 (2) SA 760 (C) 762; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 245; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 71; Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 441; Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C) 66; Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 346, 347; Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 785; Nel v Drilec (Pty) Ltd 1976 (3) SA 79 (D) 85; U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 139; Aling and Streak v Olivier 1949 (1) SA 215 (T) 220; Highlands Park Football Club Ltd Viljoen 1978 (3) SA 191 (W) especially 199-200; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 329; Aronstam 20-21; Du Plessis and Davis 98; Kahn 396; Woker 331.

[29]. KWV van ZA Bpk v Botha 1923 CPD 429 437, 438; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 171; Christie 434; Van der Merwe 157.

was on the enforcer. The onus to show that the contract was against public interest was on the denier once reasonableness was proved.

The Appeal Court did not finally settle the issue [30]. In *Van de Pol* Greenberg JA merely assumed that the position would be the same as in English law [31]. In *Steyn* Beyers JA [32] accepted that it was common cause between the parties that the onus would be on the enforcer of the contract in restraint of trade.

A strand of thought then started to develop. In a seminal review, Suzman suggested that the onus should always be on the party who relied on the illegality of the restraint [33]. The point was mooted by Kahn, considered by several Supreme Court judges [34] and finally accepted in *Roffey* in Natal [35] and *Drewtons* in the Cape [36]. In *National Chemsearch*, Botha J in the Transvaal [37] personally preferred a change of onus as a matter of opinion, and he accepted the reasoning of the court in *Roffey* on principle, but the court still bowed to previous authorities [38]. The differences needed to be settled by the Appeal Court, and this was done in *Magna Alloys* [39]. Rabie CJ decided that the

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[30]. See Savage and Pugh v Knox 1955 (3) SA 149 (N) 155, Magna Alloys 888-889, Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 506, Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 405, Aronstam 25, Kahn 397, 398, Oosthuizen 386.

[31]. Van de Pol v Silbermann 1952 (2) SA 561 (A) 569-570; Cf also Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) 439 where all the different possibilities were considered but sides were not taken.

[32]. Steyn v Malherbe 1967 (2) PH A.43 150 at 151.

[33]. Suzman 90 at 91; See Lubbe and Murray 255 and AJ Kerr (2d ed) 105, Cf infra 5.3.

[34]. Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 103-104; Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W) 359-360, See Nathan 41; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 308-309, 315-317; Commercial & Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 232; SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1868 (2) SA 777 (D) 787-788, See *Annual Survey* (1968) 99, See Aronstam 22.

[35]. Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 501-507 and especially 505, Cf also Madoo (Pty) Ltd v Wallace 1979 (2) SA 957 (T), Aronstam 22-23, Du Plessis and Davis 99-100 although their criticism cannot be accepted, Lubbe and Murray 255 and the questions asked, Nathan 35ff.

[36]. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313, See Oosthuizen 383, See the criticism Kerr 186, Du Plessis and Davis 98; Crimpers Salon (Pty) Ltd v Thomas 1981 CPD (unrep); Cf Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 405.

[37]. National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1099ff; Lubbe and Murray 255; Oosthuizen 383.

[38]. Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 189ff, See Nathan 38-39, Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 257; Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) 861-862, 863.

[39]. Magna Alloys 893, 897, See Book v Davidson 1989 (1) SA 638 (ZS) 640ff, 646, Basson v Chilwan 1993 (3) SA 742 (A) 761-762, *Annual Survey* (1984) 129, Christie 436, Kerr Tribute 187, 190, Rautenbach & Reinecke 558-559 although they were not sure whether the principle does not only create a so-called "weerlegginglas", Schoombee 143-144, Woker 332.

onus of proving all aspects of illegality will be on the person who relied on it [40]. The onus to show that the restraint is unreasonable or against public interest for other reasons will be on the denier.

The reasonableness and public interest onus will no longer be distinguished in South Africa [41]. The onus will simply remain on the denier once reasonableness is proved. The enforcer will probably bear no more than an evidentiary burden to show that the restraint is not illegal for being against public interest if the restraint has been shown to be unreasonable. The overall onus will still be on the contract denier [42].

5.3. The factors that underlie the incidence of onus

The aspects that underlie the incidence of onus are complex . The general principle is that he who avers must prove [43], although this is sometimes unhelpful. The principle was used in *African Theatres* to place the onus on the denier [44], it was utilised in *Allied Electric* to reach an opposite conclusion [45]. Distinguishing rebuttal and averment is difficult. Incidence of burden of proof will accordingly often depend upon "undefined reasons of experience and fairness" [46]. But some "reasons of experience and fairness" can be discerned.

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[40]. Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O) 685; J Louw and Co (Pty) Ltd v Richter 1987 (2) SA 237 (N) 243; Bonnet v Schofield 1989 (2) SA 156 (D) 158; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 795; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 485-486, 499, 502-503, 505; Amalgamated Retail Ltd v Spark 1991 (2) SA 143 (SEC) 150; Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 (1) SA 807 (W) 824; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 52; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 330, 331; Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 540, 542; Mparadzi v Mangwana HC-H-637-87 (unrep); Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 569; Basson v Chilwan 1993 (3) SA 742 (A) 753, 767; The Concept Factory v Heyl 1994 (2) SA 105 (T) 112; Waltons Stationery Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O) 511; Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C) 400, 407; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SEC) 444-445; Fisher v Salon Mystique 1995 (2) SA 136 (O) 142; Interest Computation Experts v Nel 1995 (1) SA 174 (T) 179; Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 784 see also 786-787 the Interim Constitution does not impact on this position, See Rautenbach & Reinecke 559ff; Kerr 477-478, 506; Van der Merwe 157; Lubbe & Murray 255; Cf Aercrete SA (Pty) Ltd v Skema Engineering Co (Pty) Ltd 1984 (4) SA 814 (D) 816 seems to imply that the mere fact that a clause is a restraint will bolster its enforceability. It is unacceptable.

[41]. Van der Merwe 157.

[42]. Schoombee 144 with reference to Smit v Bester 1977 (4) SA 937 (A) 942.

[43]. SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 787 mentioned by Kahn 393.

[44]. African Theatres Ltd v D'Oliviera 1927 WLD 122 at 129; Book v Davidson 1989 (1) SA 638 (ZS) 649-650, the same will apply to special defence issues 651.

[45]. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 329.

[46]. Book v Davidson 1989 (1) SA 638 (ZS) 647; Schoombee 143 with reference to Wigmore.

The relative weight attached to each of the principles underlying the doctrine should impact on onus [47]. The court will want to confine the onus on the contract enforcer if it regards sanctity of contract as more important [48]. It will undermine sanctity of contracts if the enforcer has a comprehensive burden of proving facts showing that the contract does not suffer from any deficiencies. A legal system that prefers sanctity of contract will be in favour of the enforcement of contracts where a conclusive decision cannot otherwise be made:

- Dominance of sanctity of contract in South Africa was vital to the argument of Rabie CJ in *Magna Alloys* [49].
- Dumbutshena CJ in Zimbabwe [50] mentioned the discussion of the notion that restraints are prima facie unenforceable in *Pest Control* [51]. He then decided that "it is not only a question of selecting the idea which takes precedence over the other in the eyes of the law". However, he later placed considerable emphasis on sanctity of contract [52].

Schoombee [53] argued that sanctity of contract cannot be a determinant of onus in South Africa. He stated that public interest will now be the acid test for restraints, and he went on to ask "Why would the covenantor's agreeing to a restraint render it likely that enforcement would not prejudice the public interest?" But the answer is simple: sanctity of contract as a public policy principle will have an important influence on the substantive and formal aspects of the doctrine.

There will be stronger reasons for saddling the enforcer with the onus if the law places priority on the protection of freedom of trade [54]. It will make it more difficult to protect freedom of work if such protection is precluded by the contract denier's placing of facts before the court. It will undermine freedom of work if restraints in inconclusive cases are upheld.

Yet, other issues outside the weighing of these broad principles may also be relevant in determining onus.

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47. Haynes v Doman [1899] 2 Ch 13 at 30, Eastes v Russ [1914] 1 Ch 468; National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1100-1101; Cf however Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 405; The terminological argument Rautenbach & Reinecke 561 does not contribute much see supra Ch 5.1.

48. Rousillon v Rousillon (1880) 14 ChD 351 at 365, Haynes v Doman [1899] 2 Ch 13 at 30-31; Trebilcock 45; Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1115.

49. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313, See the criticism Kerr (1982) 185, See obiter 315ff, Cf the criticism supra Ch 2; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 504-506; Magna Alloys 893; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 499; Basson v Chilwan 1993 (3) SA 742 (A) 761-762, 776-777; Van der Merwe 157; Suzman 91.

50. Book v Davidson 1989 (1) SA 638 (ZS) 650.

51. Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 614.

52. Book v Davidson 1989 (1) SA 638 (ZS) 646.

53. Schoombee 143.

54. Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 199 with reference to Kerr (2nd ed) 105; Van der Merwe 157; Kerr (2nd ed) 105 felt that these issues were not properly considered by the authorities, where the new view was taken.

- It would create greater systemic coherence if the restraint of trade doctrine was treated like all other manifestations of illegality in contracts [55]. The court in *Magna Alloys* stressed that effectiveness of a restraint of trade is a public policy issue. Rabie CJ said that it would be illogical and inappropriate to take the English view if it is accepted that the general principle is that a contract will be enforced unless it can be proved to be illegal and against the public policy [56]. This exaggerates the point, but it illustrates the need for systemic coherence.
- Courts would prefer to place the onus on the person who has to prove the unusual; it simplifies and reduces litigation on such points, and it will more likely produce a fair result where the case has not been proven either way [57]. It will be important to determine on what side the general factual situation that comes before the court, will fall [58]. The knowledge that restraints will often today be normal incidences of commerce could play some role in determining the onus [59].
- It might be important to determine who has personal knowledge of the facts that need to be proved [60]. This issue was previously emphasised by Kerr [61], but Schoombee is correct in cautioning that the significance of this factor must not be exaggerated [62]. Kerr [63] now also accepts that the potential problems that may be caused by this will not be insurmountable providing the onus rules are applied judiciously. The author suggests that a burden to deduce evidence in rebuttal may be placed on the enforcer if the denier can put forward a prima facie case. Evidence that is peculiarly within the knowledge of the enforcer can be so extracted.

Finally, in their discussion of onus, South African courts have stressed that the rule that a restraint is prima facie unreasonable is English, and not part of Roman Dutch law [64]. However, this in itself

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55. SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1868 (2) SA 777 (D) 787; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 503-504; Magna Alloys 893; Implicit in Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 499; Oosthuizen 386; Otto 210; Schoombee 143; Van der Merwe 157, 159; Woker 332.

56. Magna Alloys 893.

57. Heydon 40-41 seems to think that this played a role in determining the onus with regard to public interest. See both the second and third points; Kerr (2nd ed) 105.

58. McBryde 603 although he did not clearly distinguish this from the weighing of principles.

59. Cf Schoombee 143; Perhaps Rautenbach & Reinecke 561 should be so understood.

60. Kerr (2nd ed) 105; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 199 with reference to Kerr (2nd ed) 199; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 255-256; See Du Plessis and Davis 101 who emphasised the need for an accurate decision; Aronstam 22; Haynes v Doman [1899] 2 Ch 13 at 30.

61. Ibid.

62. Schoombee 144.

63. Kerr 190-191.

64. To mention but a few of the cases: Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 103-104, SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D) 788, Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 504ff but see the criticism supra Ch 2.3, Stewart Wrightson (Pty) Ltd v

is no reason for rejecting English onus principles. The point has mostly been made to show that the orthodox incidence of onus is systemically incompatible with underlying contract law principles in South Africa.

Factual aspects outside proof of reasonableness have been regarded as "increasing" or "decreasing" the onus [65]. But they have not been perceived as factors that will actually change the onus [66].

Bargaining power has been mooted as an issue that should impact on incidence of onus [67]. However, it cannot determine onus. Relative bargaining power will differ widely in a range of restraint contracts. It will be impossible to delineate categories by whether bargaining will be equal or unequal. It will be one of the aspects on which facts will have to be placed before the court.

The English and Scots courts have accepted that the onus changes when it comes to public interest. Lord Hodson in *Esso* [68] held that the reasons for this change were obscure, but it is believed that it can be explained on the basis of the above mentioned factors. The two most important ones are:

- If the restraint was shown to be unreasonable, then the onus to show that it is not contrary to the public interest will be on the covenantee. It will change the priority of general principles if the restraint is reasonable between the parties. The importance of freedom of trade will be reduced once the restraint is reasonable.
- The possibility of success will be reduced once reasonableness is proved.

Again it could be mooted that bargaining power should have a similar effect. It can be argued that the onus should change once it is shown that the parties are in a position of equal bargaining, in

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Minnitt 1979 (3) SA 399 (C) 405, Book v Davidson 1989 (1) SA 638 (ZS) 650, Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 499; Suzman 90 at 91; Aronstam 22; Kahn 393ff; Nathan 35-36; Oosthuizen 382ff; Van der Merwe 156-157; See Lubbe and Murray 255, Christie 436.

[65]. Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 797, See Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] 1 Ch 108 at 120; Herbert Morris 715; Attwood 589; Esso 324 where the court stated that the onus in certain cases will be easily discharged; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 192; M & S Drapers v Reynolds [1956] 3 All ER 814, 816, 819; Anson 324; Cheshire Fifoot and Furmston 409; Gurry 212, 213, 216; Estate Matthews v Redelinghuys 1927 WLD 307 at 312 with reference to Herbert Morris; Heydon 39; Halliwell v Laverack 1929 WLD 175 at 179; Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 717, 721; Katz v Efthimiou 1948 (4) SA 603 (O) 613 with reference to Herbert Morris; Shell Co of SA Ltd v Gerrans Garage (Pty) Ltd 1954 (4) SA 752 (G) 757; Commercial & Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 232; Kerr 514-515.

[66]. The discussion of McBryde 604 is not always clear but it is unacceptable in so far as he believed that the width of the restraint will impact upon the incidence of the onus.

[67]. Schoombee 139-140; Heydon 39-40.

[68]. Esso 319; Trebilcock 71; McBryde 603.

the same way that the onus changes after reasonableness has been proved in England and Scotland. However, courts should avoid the chaos that may ensue upon an overly fragmentary approach towards onus. The onus of proving effectiveness or ineffectiveness should be determined by broad principles unless the case clearly enters a new phase. But proof that the bargaining power favours the bearer of the onus will only be an attitudinal factor; it is normally not important enough to lead to a transfer of the onus. A switch should only take place where reasonableness inter partes as a whole has been dealt with [69].

Finally, it must be asked whether the parties may vary the onus by agreement [70]. The general principles that underlie the doctrine are the main determinants of onus, and it therefore must be determined whether the parties may alter the general preference of the legal system.

- In England and Scotland the onus will reflect a preference for freedom of trade. Change of onus clauses will certainly not alter the onus where the parties are in a position of unequal bargaining power and it is even doubtful whether clauses of this nature will be of more than attitudinal value where the parties are in a position of equal bargaining [71].
- In South Africa more emphasis is now placed on the principle of freedom of contract. Courts will probably accept a variation of onus clause if the parties are in a position of equal bargaining, although it is doubtful whether such clauses will often be included in contracts.

6. Partial enforcement and the new approach to onus in South Africa [72]

In South Africa the onus of showing unreasonableness will be on the person who wants to escape the effect of the contract. But who will now bear the onus to show that partial enforcement is possible [73]?

Schoombee [74] argued that one of the parties will bear the onus to show how much reduction will make a restraint reasonable. But two aspects must be distinguished [75]:

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[69]. See Du Plessis and Davis 100-101 although their argument is not acceptable.

[70]. See the clauses: Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O), Madoo (Pty) Ltd v Wallace 1979 (2) SA 957 (T).

[71]. Cf supra Ch 9.4 on acknowledgement clauses.

[72]. On partial enforcement see infra Ch 14.5.

[73]. Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 795-796 did not concern onus, See BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 53, The interpretation of Harms J in Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488 cannot be accepted.

[74]. Schoombee 144-145.

[75]. These aspects have never been clearly distinguished in the courts: They were separated in National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) but both were treated similarly, BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 52ff although the court noted that the enforcer will generally have to put forward the

- The requirements for partial enforcement.
- The requirements of reasonableness in terms of the restraint of trade doctrine.

The enforcer should put forward a clause that it wants to enforce partially [76], and the onus to prove reasonableness must be distinguished from this. Only if these two issues are discerned will it allow for the proper answering of both.

It may be contended that this separation is impossible because the issues are too intertwined, and it is true that they cannot be kept apart completely. Some facts may be relevant under both heads. But a court can still ask if a certain reduction of a clause should be allowed without going directly into the question of reasonableness. Three different scenarios can be gleaned from the analysis of Schoombee, and the issue will be discussed with reference to them.

The first two possibilities can be discussed together. The enforcer may admit or the denier may prove that the original restraint is too wide. The enforcer will then bear the onus to show that there is a more limited restraint that will satisfy the requirements expressed in *Chemsearch*. The facts before the court may, especially where the reasonableness issue has been fully argued, then show whether the reduced restraint will be reasonable or unreasonable. But what is the position if this is not the case?

- It may be submitted that the onus here should be on the enforcer. The wider clause has, after all, been rejected. It has been shown that there are public policy problems with the clause. The denier has discharged the onus placed upon him.
- It can be averred that the same reasons that applied in placing the initial reasonableness onus on the denier will also apply here. There is still a contract. The court still prefers freedom of contract over freedom of trade. The enforcer will have to satisfy the *Chemsearch* requirements. The denier will then have to show that the restraint is not reasonable. He will still be confronted with a clause to which he agreed on the basis that the wider original clause will have to include the narrower new proposed clause [77]. It may also be contended that the reversal of onus to prove unreasonableness will only cause confusion. The denier, in partial enforcement cases, will still be given a clear case to answer. He has to prove illegality. It will only create problems if this suddenly changes in partial enforcement cases.

The second argument is the more convincing of the two [78]. Coherence has played an important role in the establishment of onus in restraint of trade cases in South Africa, and greater coherence

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restraint that he wants to enforce, Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488, 500, 501, 503 and 512.

[76]. See infra Ch 14.5.

[77]. Infra 14.5.

[78]. Where it was admitted that a clause was unreasonable: BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 52-54 although the court did not properly distinguish the two relevant aspects; Where the court found the

will be achieved if the onus to prove unreasonableness is placed on the denier throughout. The other arguments which the courts have used in laying down onus will still apply, albeit with less vigour.

The third scenario will exist where the enforcer comes to court with a reduced clause although he does not admit that the whole clause is illegal. There will be even more powerful reasons for placing the onus of proving reasonableness on the denier once it is acknowledged that the reduced restraint meets the requirements of *Chemsearch* [79].

- It will be theoretically more satisfactory because the covenantor has not discharged the initial onus yet [80].
- It will be more conducive to the development of restraint of trade policy. It will motivate parties to attempt to enforce only the parts of the restraint that they regard as necessary.

Schoombee [81] drew a distinction between restraint contracts that consist of different clauses, where one clause can merely be blue pencilled out, and restraints that do not. He then maintained that the whole of the onus will rest on the denier in cases that fall in the former category but this distinction cannot be accepted. It is exactly the type of distinction which Magna Alloys in South Africa has rejected [82].

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initial restraint to be unreasonable: National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1114 tentatively accepted that a shift of onus (as later accepted in Magna Alloys) would mean that the onus of proving partial enforcement would be on the enforcer, See the criticism in BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 53; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503 apparently regarded the onus as being on the denier, Contra 488 although this does not say what the enforcer would have to prove.

79. The contrary view of Schoombee 145-146 is unacceptable.

80. Cf the argument in BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 54.

81. Schoombee 145.

82. See infra Ch 14.5.

Chapter 12

The legal status of ineffective restraints of trade

Table of Contents

1. The status of ineffective restraints: English law

There are few cases in which the courts have focused on this issue. Some judges talk of ineffective restraints as being unenforceable [1], while others have called unacceptable restraints void or invalid [2]. Many decisions even use the phrases "unenforceable" and "void" in the same breath [3]. In *Mogul*

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[1]. Proctor v Sargent (1840) 2 Man & G 20 at 34; Hornby v Close (1867) LR 2 QB 153 at 158, 160; Swaine v Wilson (1889) 24 QBD 252 at 257; Mason 737, 742; Herbert Morris 718; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 562, 587; English Hop Growers Ltd v Dering [1928] 2 KB 174 at 180; Eastes v Russ [1914] 1 Ch 468 at 489, 491; Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 794 in discussing the history of restraints of trade said that restraints were initially regarded as "contracts of imperfect obligation if not void for all purposes" but the term enforceability was used 794, 797; Routh v Jones [1947] 1 All ER 179 at 181, 183; Whitehill v Bradford [1952] 1 Ch 236 at 242; Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413 at 449-450; Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 579; Esso 295, 318, 321, 325, 326, 333, See infra; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 137, 138, 141, 143, 144 but see the public house cases 142; The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 695; Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1299; Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1975] AC 571 at 576, 577, 579, 580 but see there were special reasons for it in the case 577, See McBryde 608; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 403; Bridge v Deacons [1984] 1 AC 705 at 713; Spencer v Marchington [1988] IRLR 392 at 395; Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 390, 391; Edwards v Worboys [1984] 1 AC 724 at 728; Balston Ltd v Headline Filters Ltd [1987] FSR 330 at 351; Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep 570 at 613 but see the view of the parties; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 382, 383, 385; JA Mont (UK) Ltd v Mills [1993] FSR 577 at 582.

[2]. Mitchel v Reynolds (1711) 1 PWms 181 at 183, 185, 190, 191, 193; Young v Timmins (1831) 1 Cr & J 331 at 343; Wallis v Day (1837) 2 M & W 273 at 281; Hitchcock v Coker (1837) 6 Ad & E 438 at 453, 454, 456; Hinde v Gray (1840) 1 Man & G 195 at 202, 207; Proctor v Sargent (1840) 2 Man & G 20 at 32, 33, 36, 37; Mallan v May (1843) 11 M & W 653 at 665ff; Price v Green (1847) 16 M & W 346 at 353 has lead to some confusion supra Ch 2.2; Tallis v Tallis (1853) 1 E & B 391 at 410, 411, 412, 413; Nordenfelt 538, 546, 548, 549, 561, 565, 566, 568, 575; Swaine v Wilson (1889) 24 QBD 252 at 261 and 262 although the court initially at 260 talked of enforcement; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 304, 306, 307, 309, 310; Haynes v Doman [1899] 2 Ch 13 at 23, 24; 25, 26, 27; Sir WC Leng & Co Ltd v Andrews [1909] 1 Ch 763 at 769, 771; Eastes v Russ [1914] 1 Ch 468 at 474, 477, 481, 482, 485; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 474, but see enforcement is mentioned at the start 478; Mason 731, 732, 734, 745; Herbert Morris 699, 700; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 571, 597; Attwood v Lamont [1920] 3 KB 571 at 581, 582, 585, 596; Fitch v Dewes [1921] 2 AC 158 at 161; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563, 576; English Hop Growers Ltd v Dering [1928] 2 KB 174 at 185; Connors Bros Ltd v Connors [1940] 4 All ER 179 at 195; Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 552, 567, 562, 569, 570 and 572; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 131 and 132, 136 but see on enforcement: 134, 137; Dickson v The Pharmaceutical Society of Great Britain [1967] 2 All ER 558 at 567, 569; The Pharmaceutical Society of Great Britain v Dickson [1968] 2 All ER 686 at 697, 702, 704, 706, 707; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 at 1229, 1235; Lyne-Pirkis v Jones [1969] 1 WLR 1293 1301; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 817, Greig v Insole [1978] 3 All ER 449 at 495-496, 503; Edwards v Worboys [1984] 1 AC 724 at 725, 726, 727 although the court 725 also talked of enforceability; Goring v British Actors Equity Association [1987] IRLR 122 at 127; Fellowes & Son v Fisher [1976] 1 QB 122 at 128, 129, 134, 141; Court Homes Ltd v Wilkins (1983) NLJ 133 698; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 325, 327 although it emphasised a quote from Office Overload Ltd v Gunn [1977] FSR 39 where a more sophisticated view was taken; Business Seating Ltd v Broad [1989] ICR 729 at 733, 735; Dairy Crest Ltd v Pigott [1989] ICR 92 at 94; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486, 488; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 426.

[3]. Hornby v Close (1867) LR 2 QB 153 at 160, 159-160; Collins v Locke (1879) 4 App Cas 674 at 685, 686, 688, 689; Nordenfelt 551, 552 and 553, 555; Russell v Amalgamated Society of Carpenters & Joiners [1912] AC 421 at

Lord Halsbury LC [4] accepted that ineffective restraints of trade would be void, but he then went on also to accept that such agreements will not be enforced. The court acknowledged that voidness of the restraint would also lead to it being unenforceable, and this is how the issue has been dealt with in many of the cases. However, some courts have simply not drawn a proper distinction between void and unenforceable.

Only a few English authors have focused on this issue [5]. Russell believed that a restraint was unenforceable or void and he then suggested that the court in *Esso* did not also mention voidness because it was too well established [6]. Yet the author accepted that ineffective restraints will have effect in so far as parties have acted in terms of them, and most today accept that restraints are merely unenforceable [7].

The Trade Union Act of 1871 and the Trade Union and Labour Relations Act of 1974 are to the effect that ineffective restraints are void or at least voidable [8]. But in the type of cases that are discussed here this will be of little importance [9].

The few cases that truly considered the consequences of an ineffective restraint are not consistent. Some judges regarded such clauses as void. In *Joseph Evans* Scrutton and Pickford LLJ [10] stressed voidness, and this was confirmed by Slesser LJ in *Wyatt* [11]. However, these cases cannot be conclusive. In *Joseph Evans* Bankes LJ showed obiter sympathy for the notion that restraints

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437, 439; North Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1914] AC 461 at 468, 469, 470; McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society [1919] AC 548 at 581, 585, 586; Routh v Jones [1947] 1 All ER 758 at 764; Home Counties Dairies Ltd v Skilton [1970] 1 All ER 1227 1232-1233, 1233; Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] IRLR 60 63, 64, 65; JA Mont (UK) Ltd v Mills [1993] FSR 577 at 590, 591; Morris Angel & Son Ltd v Hollande [1993] ICR 71 at 76, 78; Cf in the wider field of illegality in England N Enonchong "Effects of Illegality: A Comparative Study in French and English Law" (1995) 44 *ICLQ* 198-199.

4. Mogul Steamship Co Ltd v McGregor Gow & Co [1892] AC 25 at 39, See also 42, 45-47.

5. Many of the other authors use the term void although they do not really focus on the issue: Anson, Cheshire Fifoot and Furmston, Treitel; Winfield 327-328 expressly took the view that ineffective restraints were void.

6. Russell 584.

7. Dawson 460-461 with reference to Re Home Insurance [1930] 1 Ch 102, Gurry 219, Nelson 50ff although they accepted that a different view was previously taken; Chitty 1190; Collinge especially 411.

8. See also sec 3 of the Union Act 1871.

9. See the criticism McBryde 154.

10. Joseph Evans & Co Ltd v Heathcote [1918] 1 KB 418 at 425-428, 435-438, Cf the criticism McBryde 607 with reference to Thomson v BMA [1924] AC 764 at 769.

11. Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 810-811, See also Greer LJ 808 although he relied on Scrutton LJ see infra.

are only unenforceable, although he did not finally decide the issue [12], and there are contradictory dicta in *Wyatt* [13]. The more acceptable authorities favour enforceability [14]:

- Lord Parker of Waddington in *Herbert Morris* [15] talked of the consequences of restraints in terms of voidness and validity, but he also stated that "it is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to *enforce* them except in cases where there are special circumstances to justify them". (My italics)
- Lord Reid in *Esso* [16] maintained that "one must always bear in mind that an agreement in restraint of trade is not generally unlawful if the parties choose to abide by it; it is only unenforceable if a party chooses not to abide by it".

The question was of great practical importance in a series of cases that concerned restraints on performing artists. Here restraints were part of wider agreements that also included transfers of copyrights in songs written by the covenantor songwriter.

- In *A Schroeder* Lord Reid started out by referring to the "validity" [17] of a restraint, but apart from that it was consistently held that the restraint was only unenforceable and that copyright already assigned could not be returned [18].
- The court in *Clifford Davies* [19] confusingly held that the restraint was unenforceable but it accepted in the same breath that the assignment was invalid. It is hoped that more precise language will be used in future.
- The court in *O'Sullivan* [20] again clearly accepted the *A Schroeder* approach.

The legal status of restraints has not been finally settled in English law, but it seems that the stronger opinion now leans towards the unenforceability thesis [21].

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12. Joseph Evans & Co Ltd v Heathcote [1918] 1 KB 418 at 431-432 but see the role of the Trade Union Act, See also Edinburgh Leith and District Master Plumbers' Association v Munro 1928 SC 565 at 569, 573, 575, 576 although the case decided in terms of sec 4 of the Trade Union Act, See McBryde 607.
13. Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 807, 810.
14. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 489; Watson v Prager [1991] 1 WLR 726 at 738, 742, 751, 750 with reference to Esso 297; Office Overload Ltd v Gunn [1977] FSR 39 at 42; R v General Medical Council, Ex parte Colman [1990] 1 All ER 489 at 508.
15. Herbert Morris 706-707; Green v Price (1845) 13 M & W 695 at 699.
16. Esso 305
17. A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616, Lord Reid 618.
18. Instone v A Schroeder Music Publishing Co Ltd [1974] 1 All ER 171 at 176, 177 and especially 181, See Dawson infra 4.1; A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 623, See Lord Diplock, The court of first instance probably regarded the restraint as void see Instone 172. McBryde 608 tried too read too much into this; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 249.
19. Clifford Davis Management Ltd v WEA Records Ltd [1975] 1 WLR 61 64-65, 66.
20. O'Sullivan v Management Agency and Music Ltd [1985] 1 QB 428 at 448, 469 per Fox LJ, 470 per Waller LJ.
21. Contra Zang Tumb Tuum Records Ltd v Johnson [1993] EMLR 61 at 74, 75.

Courts should in future refrain from stating that ineffective restraints are void and, more importantly, lawyers should not use "void" and "unenforceable" as if they are synonyms. It courts confusion to use them in tandem and this will be especially true when, like *Russell* [22], it is accepted that an ineffective restraint has all the traits of what is commonly known as an unenforceable contract.

2. Scottish authorities focused on the legal status issue

The cases can again be divided into the same three categories that are mentioned in the discussion of English law: restraints have been regarded as void [23], unenforceable [24] or unenforceable and void [25].

But the issue has been explicitly considered by McBryde [26]. After much discussion he concluded that restraints should be regarded as unenforceable at the option of the parties. He submitted that voidness is more drastic than unenforceability and he preferred the less drastic alternative. Walker is not consistent in his use of the words void and unenforceable. However, in his reference to *Esso*, he emphasised unenforceability [27]. It would therefore also be more acceptable to regard ineffective restraints as unenforceable here.

3. The consequences of illegality of a restraint in South Africa

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22. Russell 584.

23. Mulvein v Murray 1908 SC 528 at 531, 533 and 535; Kennedy v Clark (1917) 33 ShCt Rep 136 at 140; BMTA v Gray 1951 SC 586 at 601, 602; Giblin v Murdoch 1979 SLT ShCt 5 at 6; Rentokil Ltd v Hampton 1982 SLT 422 at 423; Strathclyde Regional Council v Neil 1983 SLT ShCt 89 at 90; Malden Timber Ltd v McLeish 1992 SLT 727 at 733; Malden Timber Ltd v Leitch 1992 SLT 757 at 763; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160.

24. Amalgamated Society of Railway Servants for Scotland v The Motherwell Branch of the Society (1880) 7 R 867 at 871; Stewart v Stewart (1899) 1 F 1158 at 1167, 1168, 1171, 1172; Minimax Ltd v Geddes (1914) 31 ShCt Rep 36 at 39; Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1115; Mulvein v Murray 1908 SC 528 at 532 and 533; Taylor v Campbell 1926 SLT 260 at 261; Kilgour v McNicol 1961 SLT ShCt 8 at 9; MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95 at 98, 99; Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 39; Nu-Swift International Ltd v Mckay 1987 GWD 30-1132; Dallas McMillan v Simpson 1989 SLT 454 at 457; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452, 453.

25. Stewart v Stewart (1899) 1 F 1158 at 1170; Dumbarton Steamship Co Ltd v MacFarlane (1899) 1 F 993 at 997; Remington Typewriter Company v Sim (1915) 1 SLT 168 at 170; Scottish Farmers' Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 150, 151; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 22, 24; SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 35, 36, 37; Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248; Fraser 93; Scott Robinson 156; Whish *Stair Encyclopaedia* 1214 and 1215.

26. McBryde 607-608 and the general remarks 573; See along essentially similar lines McBryde Thesis 150ff.

27. Walker 184.

In pre-*Magna Alloys* law a distinction similar to the one drawn above can again be made between cases that regarded restraints as unenforceable [28], void [29] or unenforceable and void [30].

Discord existed even in the cases that focused on this issue. The Full Bench of the Transvaal in *National Chemsearch* [31] leaned towards the view that illegal restraints were only unenforceable, and its Cape equivalent accepted the notion in *Drewtons* [32]. However, King J in *Allied Electric* [33] strongly asserted that illegal restrictions were void.

The issue was finally and unequivocally settled in *Magna Alloys* [34]. Rabie CJ decided that an illegal contract in restraint of trade is unenforceable and not void. Support was found in an influential

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28. Tilney v Rock and Way 1928 EDL 108 at 110; Lewin v Sanders 1937 SR 147 at 148; Van de Pol v Silbermann 1952 (2) SA 561 (A) 569-570 and see also the submissions discussed but not decided; Brenda Hairstylers (Pty) Ltd v Marshall 1968 (2) SA 277 (O) 280; Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C) 66; Super Safes (Pty) Ltd v Voulgarides 1975 (2) SA 783 (W) 785; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 254.

29. Edgcombe v Hodgson (1902) 19 SC 224 at 226; Trimble v Jameson & Co (1903) 24 NLR 53 61, 62; SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 370; KWV van ZA Bpk v Botha 1923 CPD 429 at 434, 435, 437, 438, 440, 441; Gordon v Van Blerk 1927 TPD 770 at 773; Durban Rickshas Ltd v Ball 1933 NPD 479 at 493; Brooks and Wynberg v New United Yeast Distributors (Pty) Ltd 1936 TPD 296 at 303; Lewin v Sanders 1937 SR 147 at 153; Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140 151; Vermeulen v Smit 1946 TPD 219 at 221; Aling and Streak v Olivier 1949 (1) SA 215 (T) 219, 225; Ex Parte Spring 1951 (3) SA 475 (C) 478; Roberts Construction Co Ltd v Verhoef 1952 (2) SA 300 (W) 304; Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR) 717, but see 722; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 171; Weinberg v Mervis 1953 (3) SA 863 (C) 865; Rogaly v Weingartz 1954 (3) SA 791 (D) 792; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 612; Groenewald v Conradie 1957 (3) SA 413 (C) 415; Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 501; Kock & Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA 308 (A) 317; Pieterse v Cilliers 1945 (2) PH A.31 53 at 54; Berger v Osher 1965 (1) SA 558 (W) 559; Wohlman v Buron 1970 (2) SA 760 (C) 762; A Becker and Co (Pty) Ltd v Becker 1981 (3) SA 406 (A) 417; Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W) 858.

30. New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 82; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 2; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 72; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 200; Nursing Services SA (Pty) Ltd v Clarke 1954 (3) SA 394 (D); Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 441; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 501, 505 and 503, 507, See especially 504.

31. National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1107 although he did not draw a clear distinction, See Schoombee 147, 149.

32. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313, See Kerr (1982) 186, Schoombee 133.

33. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330 with reference to Brooks & Wynberg, Gordon v Van Blerk 1927 TPD 770 at 773, Wilkinson v Wiggil 1939 NPD 4 and Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) but see the discussion supra. The point was not clearly taken in this last mentioned case. The same can be said about the reference to De Wet & Yeats 80-81.

34. Magna Alloys 895; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 485, 503; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 330, 331; Book v Davidson 1989 (1) SA 638 (ZS) 642; Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 31; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 794, 795; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 499ff; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 571; Basson v Chilwan 1993 (3) SA 742 (A) 742, 767; Kerr 477, 506; Christie 443 the use of "void" is probably an oversight by the author; Schoombee 147 but see the qualifications; Van der Merwe 158.

article by Aquilius where it was stated that [35] "a contract against public policy is one stipulating a performance which is not per se illegal or immoral but which the Courts, on grounds of expedience, will not enforce because performance will detrimentally affect the interests of the community".

The conclusion reached in *Magna Alloys* will now prevail. However, Aquilius did not attempt to establish a general theory in the quoted passage [36]. There was much authority for the view that contracts that are illegal for being against public policy will be void [37]. Aquilius probably also believed that illegal contracts were void and *therefore* also unenforceable [38]. The use of the word "unenforceable" here was not significant.

Accordingly, different types of contracts that are against public policy may arise. Some grounds of public policy will lead to voidness, others merely to unenforceability. Some contracts against public policy will probably in future be treated in the same way as contracts in restraint of trade, but many will remain void [39]. A restraint of trade in South Africa will now in many respects be treated like an "obligatio naturalis" [40], although no such comparison was drawn in *Magna Alloys*. Some authorities have distinguished between natural obligations and illegal contracts [41]. But it was only drawn because it was believed that all illegal agreements would necessarily be void [42]. Obligationes naturales have become a stagnant historical nicety [43], but it may now be in for considerable development within the context of illegal obligations. The concept will still have to be properly developed [44], but it is now conceivable that illegal restraints and some other illegal contracts may be unenforceable, while many other illegal contracts will remain void [45].

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35. Aquilius (1941) 346; National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1107; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330 where it was accepted that this view was taken by Aquilius; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 311.
36. Schoombee 148 with reference to Aquilius (1941) 344.
37. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330 with reference to De Wet and Yeats 80-81, De Groot Inl 3.1.42 and 43, Sande Dec Fris 3.1.1, Voet 2.14.16, Van der Linde 1.14.6.
38. Kerr (1982) 187 is incorrect in concluding that Lord Halsbury in Mogul and Aquilius are similar in their emphasis on enforceability, See supra 12.1.
39. Kerr 479, Cf 152; This appears to be the view of Van der Merwe 146.
40. See Lubbe and Murray 261.
41. See Lubbe and Murray 9-10; Gibson v Van der Walt 1952 (1) SA 262 (A) 268 with reference to Dodd v Hadley 1905 TS 439; NJ Van der Merwe (1962) *THRHR* 275.
42. Lubbe and Murray 240; Van der Merwe 146.
43. See the conclusion of NJ Van der Merwe (1962) *THRHR* 275; See also Joubert *Law of Contract* 13-14 on the notion that there is a numerus clausus here.
44. Schoombee 149.
45. Van der Merwe 139, 146; Kerr 477ff; See the criticism of some authorities Christie 466, 472-473 and see the criticism of the authorities on which the author relied: De Wet & Yeats 290, Van der Merwe 124 and 147-148, Lubbe and Murray 204-205.

Kerr [46] concluded that some restraints will still be void. But this view can be rejected outright. The authorities are against it. The author tried to sow doubt about the opinion of the court in *Magna Alloys* where none exists [47]. He made several contradictory points, and some of his arguments seem irrelevant to his main submission. However, the following main criticisms can be brought against his view:

- Kerr observed that counsel stated that the restraint would be void and unenforceable, and he concluded that the court did not see these as alternatives. This may be correct . However, he then contended that there are dicta in the judgment where the court also interpreted unenforceable as meaning void and therefore unenforceable. This is unacceptable. Kerr referred to *Magna Alloys* [48], where Rabie CJ analysed the English law and stated that "the English law is, in short, that every curtailment on the freedom of trade of a party is unenforceable (or void as some decisions would say)" (my translation). He then concluded that "unenforceable" was here used as a synonym for "void". But the court was commenting on the alternating views taken in English law.
- Kerr contended that some passages in the judgment indicate that the court used "unenforceable" as an abbreviation for "void or unenforceable". He quoted the passage where Rabie CJ stated that "the fact that our common law does not declare that an agreement which curtails a person's freedom to trade is void or unenforceable has the consequence that we must today take the view that such agreements are in all circumstances enforceable" (my translation). But his observations are again based on a misinterpretation. The judge was thinking on two levels. He discussed the earlier position using terminology that would be most apposite [49]. He then moved on to the current position where, according to his own decision, restraints are merely unenforceable.

Kerr finally had to admit that there are passages in the judgment where "unenforceable" is clearly not used as an abbreviation for void or unenforceable [50]. The author thus concluded that one cannot be sure that the word "unenforceable" was so used. This is wrong. One can be certain that the court did not use it thus.

Kerr moreover seems to think that a restraint will be void if there is no possibility, at conclusion, that it can ever be in the public interest, while it will only be unenforceable if there is such a possibility. But this must be rejected:

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46. Kerr *Tribute* 192-193; Cf also the possibility of a wider enforceability discretion: Kerr 477ff, Kerr *Tribute* 197-198, Van der Merwe 159.
47. Kerr *Tribute* 191-192; Cf Kerr (1982) 186 and his discussion of Drewtons.
48. Magna Alloys 886.
49. Other examples of Kerr *Tribute* 192 can be similarly criticised.
50. Magna Alloys 895.

- The possibility that a contract may have effect again is, in a sense, a consequence of the principle that it is only unenforceable, but there is no reason why it should work in reverse. Restraints are regarded as unenforceable rather than void because courts do not condemn them to such an extent that they want to undo contractual relationships where the parties have chosen to obey them. The mere fact that enforcement will probably never be granted by a court does not radically affect the position. The illegality of the restraint is not necessarily increased when there is no conceivable event that will make the restraint legal.
- It is doubtful whether the distinction proposed by Kerr can truly be drawn on the facts of a case. According to him a restraint can only be void if it is illegal to such an extent that it can never be maintained; but when will this ever be the case? The restraint of trade doctrine will become very fragmentary if the distinction proposed by Kerr is drawn. It will therefore be important to make a clear distinction between the cases that fall in one category or the other. The actual distinction proposed by Kerr does not meet these requirements. He stated:

> "If the specified interest is entitled to protection, it will normally happen that the operation of the restraint for a limited time in a limited area will be held to be reasonable. Restraints are, accordingly, not likely to be declared not to have come into existence if the dispute concerns the duration or area of its operation. But if the interest sought to be protected is not entitled to protection the restraint can never be held to be in the public interest and can properly be said not to have come into existence."

However, there will be restraints that are not made for the protection of legitimate interests that may ultimately be maintained while it is conceivable that some restraints, aimed at protecting legitimate interests, will be too wide to have a hope of ever being enforced.

It will place parties in an impossible position if the distinction made by Kerr is followed. All illegal restraints in South Africa will only be unenforceable.

4. Effect of unenforceability

There are many aspects that will, however, have to be worked out. These issues have been neglected by the courts but they may still return to reap both practical and theoretical havoc.

4.1. Enforcement of obligations that are ineffective because they are not severable from ineffective restraints

It may be contended that counter-performance for unenforceable obligations can be claimed once such obligations have been performed. The only requirement, where performance of the ineffective

obligation or obligations has taken place, would then be that the obligation which is so enforced should not itself be ineffective because it is in restraint of trade.

In *Bishop* [51] the court accepted that such counter-performance could be claimed. However, the issue was not discussed in any detail by the court. It was again taken up in *Joseph Evans* but it was still not finally settled. Bankes LJ [52] acknowledged that the issue whether the restraint was unenforceable or void could play a role in determining the answer, and he showed some predilection for the enforceability thesis. Scrutton LJ [53] was critical of the principles expressed in *Bishop*. He believed that the status of an ineffective restraint was also important and was strongly of the view that an ineffective restraint was void. Slesser LJ in *Wyatt* [54] supported his critical view.

However, the probable principle in Scotland and England, and the definite current view in South Africa, will be that restraints are only unenforceable. The ratio for rejecting the *Bishop* case has now disappeared. But it should still be asked whether there are no other grounds for rejecting *Bishop*.

It might be argued that an unenforceable restriction would, subject to severability [55] and partial enforcement notions, permanently taint the other aspects of the contract with unenforceability even if it does not make the contract void. This is the effect of a void covenant, and there is no logical reason why the same consequence should not ensue in both cases.

However, there are stronger arguments for taking a contrary view. Courts stress unenforceability with the aim of limiting the disruption to working contractual relationships. But a strict application of the doctrine may lead to serious injury for the party whose interests are supposed to be protected by the restraint of trade doctrine. A party who performs an ineffective obligation will be unable to reclaim performance, while he will not be allowed to claim counter-performance either. It is submitted that the *Bishop* principle should be resuscitated. Its rejection was based on a false premise. A contract which is unenforceable in restraint of trade will on this principle become enforceable in so far as it has been performed. The significance of severability or partial enforcement will be much reduced. It will only come into play where the contract has not been performed.

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51. Bishop v Kitchin (1868) 38 LJQB 20.
52. Joseph Evans & Co Ltd v Heathcote [1918] 1 KB 418 at 431.
53. Ibid 437-438; See the same judge Rawlings v General Trading Co [1921] 1 KB 635 at 646.
54. Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 810-811; Winfield 328.
55. On the interaction between consequences and severability cf McBryde 608.

Dawson [56] distinguished between absolute and relative enforceability. He accepted that relative enforceability is not unique. He then suggested that restraints should be so dealt with. He discussed the problems that could flow from *Instone* [57]. In casu a composer (I) bound himself to write songs exclusively for the publisher (A). (I) also agreed to transfer all copyrights to the covenantor while (A) in turn agreed to pay royalties. Dawson [58] accepted that the artist would be able to claim royalties on the above mentioned grounds for copyrights transferred even if the contract was unenforceable in restraint of trade. The most difficult problem that will ensue in this, and similar cases, will however not be solved by relative enforceability. The artist would still have no control over his copyright and, because the restraint is only unenforceable, the copyrights could not be reclaimed. It seems that the covenantor would have to accept that he has no more than a claim on royalties. Ultimately the doctrine is aimed at protecting freedom of work, and not at establishing complete parity between the parties [59].

4.2. Rights of a person who has performed obligations that were made in exchange for an ineffective restraint

Difficult issues may arise in cases where performance in exchange for part of the restraint that still has to be performed has already been made. Heydon [60] thought that windfalls for the covenantor are not a problem because the covenantee has acted in a morally reprehensible way, but many restraints are morally neutral. Thus in *Esso* the restraint was connected to a wider contract that also contained a loan of money. Lord Reid [61] assumed that a restraint tied to a contract of loan would have to be performed if the covenantor was not prepared to repay the loan immediately.

The problems in this field can be solved in the light of the dictum of Lord Reid. An example can be postulated. A contract is concluded between (A) the covenantee and (B) the covenantor. The restraint is ineffective. There is an obligation on (A) which is unenforceable as it is not severable from the restraint (irrespective of whether it is counter-performance for the restraint or whether it is merely unenforceable because of the restraint). This obligation has been performed in full or in part by (A). (B) now refuses to perform on the basis that his obligations are unenforceable while (A) cannot reclaim because the obligation was only unenforceable and not void. It will, in this scenario, be very unfair towards (A) if (B) is simply allowed to hold onto performance without

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56. Dawson 462.
57. Instone v A Schroeder Music Publishing Co Ltd [1974] 1 All ER 171.
58. Dawson 462.
59. This is the final answer to the problems foreseen by Nelson 51-52.
60. Heydon 76 with reference to Mitchel v Reynolds (1711) 1 PWms 181 at 196.
61. Esso 299; Cf Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1975] AC 571 at 579 where a different view was taken although the lease here was severable.

giving anything in return. It is difficult to see how this problem can be solved, and there is no authority on this point in any of the three legal systems.

However, a theoretical analysis of unenforceable obligations, and especially of obligationes naturales in South Africa, provides some solutions. Unenforceable obligations create legally binding contracts that are mainly defective in the sense that courts will not lend its machinery to enforcing them (although some of these contracts are also deprived of other consequences normally applying to obligations).

If (B) refused to perform his reciprocal obligation, then (A) will probably be allowed to cancel the contract, and one of the consequences will be that restitution will have to take place. Money will have to be repaid in loan cases and property will have to be returned in lease cases. The only question will be whether the duty of restitution will be tainted by the unenforceability, and it is submitted that it is separate enough. (B) will have to perform the restraint to avoid having to bear the above mentioned consequences of a terminated contract.

The terms used by Lord Reid in *Esso* [62] remain open to some criticism. The judge assumed that if "the respondent had not offered to repay the loan so far as it is still outstanding the appellants would have been entitled to retain the tie". The whole issue should work the other way round. A covenantor will, even though the restraint is unreasonable, sometimes have to perform it to avoid termination of the contract and loss of reciprocal benefits.

5. The legal status of restraints that are not based on obligations

So far no distinction has been drawn between true obligations in restraints of trade and other rules and conditions in restraint of trade. In general it should also be accepted that such conditions and rules will not be void [63], but it is paradoxical to talk simply of enforceability here. The best approach would probably be to regard these rules and conditions as simply relatively ineffective in a manner which is analogous to the unenforceability of obligations.

5.1. The legal status of conditions

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62. Esso 299, Cf many cases have been decided on the basis that limitations on redemption are affected by the illegality: Esso 314, 321, MacIntyre v Cleveland Petroleum Co Ltd 1967 SLT 95. This solution would be acceptable if an enforceable loan agreement was left standing after severability see Chitty 16-165 and 16-168, Cf Diplock LJ Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 580 he thought it an academic question as the covenantor was willing to redeem and investment became improvident.

63. Contra Enderby Town Football Club Ltd v The Football Association Ltd [1971] 1 All ER 215 at 219 and see the authorities quoted supra 1. Some will be relevant here.

Heydon [64] contended that obligations to which conditions in restraint of trade are attached will be ineffective if the conditions are ineffective unless the obligations can be severed from the conditions. However, this is unacceptable if it is acknowledged that conditions are merely relatively ineffective. The obligation to which the condition is tied should only be unenforceable in so far as a restraint is unperformed.

This approach has not been followed by the courts up to now, but it is submitted that this would have provided the fairest and best solution to the problems in *Wyatt* [65]. The majority did not take an express view but they seemed to think that the restraint merely constituted a condition to which the payment of the pension was subject, and this appears most acceptable [66]. On the solution proposed here, the restricted person would have been able to claim a pension that was subject to a condition in ineffective restraint of trade if he was prepared to comply with the condition [67]. It appears from the decision that he was so prepared and that he complied with it for some time.

It may be argued that this makes the restraint of trade doctrine irrelevant when it comes to conditions. A condition in restraint of trade does not place any obligation on the person who is subject to it, and this solution will reduce the relevance of the doctrine in this area. If (A) agrees to pay (B) £100 subject to a condition which is a restraint, then the following possibilities will exist:

- If the condition is legal (A) cannot be required to perform unless (B) complies with the restraint.
- If the condition is ineffective and (B) has not complied with it, (A) will still be able to avoid the obligation.

Yet it remains important that the court scrutinise these clauses in terms of the doctrine. It is possible that the obligations to which an ineffective condition is attached may also be severable from such ineffective conditions, and it may allow the person subjected to the restraint to enforce the obligation without having to comply with the condition [68].

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[64]. Heydon *McGill* 358; See Heydon 203.

[65]. Wyatt v Kreglinger and Fernau [1933] 1 KB 793, Cf the explanation Chitty 1204.

[66]. Scrutton LJ 806 assumed that the restriction did not constitute an obligation, Slesser LJ 809 accepted that it would not make a difference whether the restraint was constituted in an obligation or not; See also Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 282ff, Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 390-391 were inclined towards accepting that the restraint was a condition.

[67]. The same would probably be a possibility in Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 if severance was not possible although the covenantor here was in breach of the condition; In Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 the court was prepared to sever the restrictive condition but this could also have provided a solution although the covenantor was not prepared to abide by the restraint.

[68]. See Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390, In Re Prudential Assurance Co's Trust Deed [1934] 1 Ch 338, Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388.

Chapter 13

The time at which effectiveness should be determined

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1. The time at which effectiveness should be determined

The question whether a contract is acceptable or ineffective may differ depending on the time at which such reasonableness is determined [1].

- Facts may intercede between the making of the contract and the coming to court of the restraint, and these may influence the effectiveness of the contract [2].
- The dynamism of public policy must not be over-estimated [3]; too much emphasis is sometimes placed on this factor by South African authors [4]. Yet changes to public policy may impact on effectiveness even if the facts of a case remain more or less similar over time.

2. The time at which effectiveness should be determined: England and Scotland

It is trite in England and Scotland that questions of ineffectiveness have to be determined *at* the moment when the restraint is concluded [5]. Both reasonableness inter partes and reasonableness in the public interest will be so determined [6].

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[1]. Heydon 133 and the distinction between different time issues cannot be accepted.

[2]. Van den Heever J in Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 312 seems to overlook this point; See generally on stability of circumstances Kerr 197.

[3]. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 312 but see the criticism supra Ch 2.3.2.

[4]. See e.g. Van der Merwe 158.

[5]. Already mooted by counsel in the context of a bond in Chesman v Nainby (1727) 2 Str 739 at 742. This might be one of the reasons for the later formalism; Keppell v Bailey (1834) 2 My & K 517 at 530 although it concerned consideration questions; Heydon 135 also mentioned Kimberley v Jennings (1836) 6 Sim 340 at 350 but the discussion of time here does not concern the effectiveness of a restraint; Elves v Crofts (1850) 10 CB 241 at 260; Jones v Lees (1856) 1 H & N 189 at 193; Benwell v Inns (1857) 24 Beav 307 at 311; Rannie v Irvine (1844) 7 Man & G 969 at 976-977; Nordenfelt 573-574; Badische Anilin und Soda Fabrik v Schott Segner & Co [1892] 3 Ch 447 at 452 although it is not clear; Townsend v Jarman [1900] 2 Ch 698 at 703 ex post facto occurrences would not "necessarily" invalidate a restraint; Dowden & Pook Ltd v Pook [1904] 1 KB 45 at 55; Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 at 367, 369, 370 although the court made an exception; Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781 at 797; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 574; Putsman v Taylor [1927] 1 KB 637 at 643; Palmolive Co (of England) Ltd v Freedman [1928] 1 Ch 264 at 271, 275 and 276; Gilford Motor Co Ltd v Horne [1933] Ch 935 at 967; Routh v Jones [1947] 1 All ER 758 at 761; Cf however Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 2 All ER 657 at 687 where the question was left open; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 13; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 644; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1377; Scorer v Seymour Jones [1966] 1 WLR 1419 at 1425; Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 563; Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1301; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 822-823; A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 at 618; Bridge v Deacons [1984] 1 AC 705 at 718; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 486; Watson v Prager [1991] 1 WLR 726 at 738, 749; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 426; Briggs v Oates [1991] 1 All ER 407 at 417; Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 161, 169; Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229 at 380; Anson 321; Cheshire Fifoot and Furmston 406; Chitty 1193; Davies 497ff; Gurry 210; Treitel 401; See Heydon 133; Stewart v Stewart (1899) 1 F 1158 at 1166 creates the impression, but see 1168; Although not clear Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 at 1110-1111 although it was not finally decided; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452; Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1160; Gloag 572.

The principle has nevertheless been the root of considerable confusion. On the one hand, a very narrow view was sometimes taken [7]. Some authorities took this notion literally and ignored all future events. However, on the other hand, some very wide approaches have been proposed by other authorities:

- Heydon [8] accepted that the extent to which a covenantor has actually learnt trade secrets or built up customers should be looked at in determining reasonableness. But it is impossible to see on what basis such events should be excluded from the general rule.
- Lord Denning MR in *Shell* [9] decided that reasonableness could also be determined by looking at circumstances that were unforeseeable at conclusion of the contract but which had impacted on the reasonableness of the clause. Yet his opinion was only a minority view in the particular case.

The most acceptable view expressed in Scotland [10] and England [11] is that reasonableness should be determined from the time when the contract is concluded. Reasonableness should be determined by looking at what was likely from this point. Strong authority does not exist on this point, but proper effect can be given to the necessary policy considerations if reasonableness is so determined [12]. Yet this principle must still be flexibly applied:

- Some extension might be possible. Heydon [13] referred to the Australian High Court decision in *Amoco* where Gibb J [14] held that subsequent events could be considered in so far as they throw light on the circumstances existing at conclusion. This is acceptable as long it is not used as a means of considering unforeseeable subsequent events by the backdoor.

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6. Heydon *McGill* 344, Heydon 136; Cf contra Nathan supra Ch 10 but see Dempsey v Shambo 1936 EDL 330 at 335 at 338.
7. See the criticism of Gilford Motor Co Ltd v Horne [1933] Ch 935 at 967-968 infra Ch 6.1; Although the decision is difficult to understand Luck v Davenport-Smith [1977] 242 EG 73 at 90 but see 88; Nelson 40.
8. Heydon *McGill* 344.
9. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 489 infra 1.3, See Trebilcock 326-327; See also Lyne-Pirkis v Jones [1969] 1 WLR 1293 at 1300; Heydon 135, 136 and the questions asked.
10. Not clearly expressed in Scotland but see Scottish Farmer's Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 mentioned Rannie v Irvine (1844) 7 Man & G 969 infra although it is not clear if it was quoted for this purpose; McBryde 604; Walker 185.
11. Rannie v Irvine (1844) 7 Man & G 969 at 976-977, 978 accepted that extravagant contingencies could not be looked at in determining reasonableness; Nordenfelt 574; Palmolive Co (of England) Ltd v Freedman [1928] 1 Ch 264 at 284; Putsman v Taylor [1927] 1 KB 637 at 643, See Heydon 134; Vandervell Products Ltd v MacLeod [1957] RPC 185 at 191 stated that there was force in the argument; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 644; Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1377; Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 where Lord Denning at 488-489 accepted that this is the orthodox position, See the majority view 493-494 ; Cheshire Fifoot and Furmston 406; Heydon 134-135, 191-192, 186.
12. Heydon 136.
13. Heydon *McGill* 344; Heydon 135-136.
14. Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 1 ALR 385 at 409-410.

- The discretion of the court to grant interdict may be used to discount some of the problems that will follow upon a too strict approach [15].

3. The time at which legality should be determined in South Africa

The same approach as in England and Scotland was followed initially. Reasonableness had to be determined in the light of the circumstances existing at conclusion of the contract [16]. The approach of the courts in South Africa was also sometimes very narrow [17], although it was similarly accepted that foreseeable facts could be considered [18]. But a wholly different road has now been taken.

It has been decided that the reasonableness of the restraint has to be determined at the moment when the court is asked to enforce it. The view had steadily developed in the Supreme Court [19], when Rabie CJ in the Appeal Court in *Magna Alloys* accepted that enforceability, and therefore also reasonableness, had to be determined at the time when the court is asked to enforce the restraint [20]. This does not mean that the court will only look at events up to this point. Reasonable

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15. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 492.

16. Durban Rickshas Ltd v Ball 1933 NPD 479 at 490, 497; Dempsey v Shambo 1936 EDL 330 at 335, 338; Vermeulen v Smit 1946 TPD 219 at 222; Schwartz v Subel 1948 (2) SA 983 (T) 989; Aling and Streak v Olivier 1949 (1) SA 215 (T) 219, 225; Cowan v Pomeroy 1952 (3) SA 645 (C) 649; Weinberg v Mervis 1953 (3) SA 863 (C) 866 but see the interpretation 869-870; Pest Control (Central Africa) Ltd v Martin 1955 (3) SA 609 (SR) 613; Savage and Pugh v Knox 1955 (3) SA 149 (N) 155; Baldwin & Lessing v Muller 1958 (2) SA 500 (T) 502; Filmer v Van Straaten 1965 (2) SA 575 (W) 579; HE Sergay Estate Agencies (Pvt) Ltd v Romano 1967 (3) SA 1 (R) 2; Diner v Carpet Manufacturing Co of SA Ltd 1969 (2) SA 101 (D) 105; Wohlman v Buron 1970 (2) SA 760 (C) 763; Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 (2) SA 333 (W) 348; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 71; Biografic (Pvt) Ltd v Wilson 1974 (2) SA 342 (R) 347, See National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1106; Malan v Van Jaarsveld 1972 (2) SA 243 (C) 245; Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C) 67; Nel v Drilec (Pty) Ltd 1976 (3) SA 79 (D) 85; U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 140; Highlands Park Football Club Ltd v Viljoen 1978 (3) SA 191 (W) 200; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 329; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 403; Commercial & Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 234.

17. See especially Schwartz, Malan, Aling, Baldwin, Filmer ibid and see the criticism in Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330; Magna Alloys 894 presented the earlier view in very narrow terms.

18. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330 with reference to Heydon 134; Commercial & Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 234; Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 403; Schoombee 146 with reference to Christie (1st ed) 358-359.

19. Mooted but not decided in Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 507, Nathan 42 and the criticism supra, Aronstam 25; Recycling Industries (Pty) Ltd v Mohammed 1981 (3) SA 250 (SEC) 259 did not decide it; National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1105ff; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 312, See also 308-309 and 315 where it was left open.

20. Magna Alloys 894, 895-896, 898, *Annual Survey* (1984) 129-130; Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O) 686; J Louw and Co (Pty) Ltd v Richter 1987 (2) SA 237 (N) 243; Book v Davidson 1989 (1) SA 638 (ZS) 642; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 795; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 499, 500, 502-503; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 330, 331; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 569; Rawlins v

foreseeability from the moment when the courts are asked to enforce restraints will probably also play some role [21], and the courts will, where relevant, determine whether a restraint would be enforceable during the entire duration of the restraint [22]. But courts in South Africa now have a completely different point of departure.

4. The different approaches: a comparison

There are good reasons why the *Magna Alloys* approach is preferable to even the wider expression of the time principle in English law [23]. The restraint of trade doctrine is based on public policy. Its main aim is the protection of the interests of the public [24]. The English approach may produce results that are not founded on the actual public policy position of a given set of facts, and may lead to artificial and rigid decisions [25]. The court in *Aling* [26] said it would be artificial and arbitrary to look at later factors, but the opposite is true. Lord Denning MR in *Shell* [27] stated that "the court never speculates as to what may happen if it knows for certain what has happened". This is perhaps too strongly put, but it is certainly preferable that a case should be decided on actual facts. The temptation to look at unforeseeable events between the trial and the conclusion of the contract has always been very big [28], and this illustrates the artificiality of the English approach.

There have, however, always been some reservations about the approach that is now followed in South Africa. It was previously explicitly rejected in South Africa [29]. It is one of the shortcomings of the latest South African cases that these issues were not dealt with in any detail. Very few of the problems with this approach were discussed in *Magna Alloys* [30], while the Zimbabwean Court in *Book* laconically noted that the new approach would be "logical and just" [31]. Some of the

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Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 540; Interest Computation Experts v Nel 1995 (1) SA 174 (T) 179; The Concept Factory v Heyl 1994 (2) SA 105 (T) 112; Kerr 477, 505; Kerr *Tribute* 189; Lubbe and Murray 261; Van der Merwe 158; Cf Trebilcock 69, 148-151.

21. Magna Alloys 895; Schoombee 146.

22. Ibid.

23. See also Hogarth J in Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 1 ALR 385, Heydon *McGill* 344 mentioned the risk that witnesses who could testify to the circumstances at conclusion might not be available later.

24. National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1107, Magna Alloys 894; The court a quo in Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 492.

25. National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1106-1107.

26. Aling and Streak v Olivier 1949 (1) SA 215 (T) 219.

27. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 489.

28. Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 1377; Heydon *McGill* 344 mentioned dicta where the rule was ignored.

29. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W); Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C) 403.

30. Schoombee 147 with reference to Magna Alloys 895, 898; Lubbe and Murray 261.

31. Book v Davidson 1989 (1) SA 638 (ZS) 642.

conundra that may be caused by the new approach in South Africa, and possible answers to them, accordingly need to be analysed.

4.1. The less serious objections to the new approach in South Africa

The court in *Allied Electric* [32] complained that it would be possible to manipulate facts to ensure reasonableness if legality is determined when the restraint comes to trial. King J mentioned the example of the employer who provides his employee with a trade secret just to ensure that the restraint will be reasonable. But the courts should look at the function and position of the employee within the organisation of the employer. The reasonableness of the restraint will not be influenced if it is clear that the trade secret was not given to the employee as a normal incidence of his employment. Issues like these will not be problematic because the court will have to look at the facts as a whole.

In *Allied Electric* [33] King J interpreted the notion that reasonableness had to be determined at the moment when the court is asked to enforce it as meaning that reasonableness would be determined at the time when a case comes to trial. He then urged that this may cause anomalies and injustices, because public policy may change from the time when action is instituted to the time when it comes to trial. But difficulties of this nature will seldom arise; public policy is not that dynamic. His criticisms might be relevant in a very small minority of cases. Events that arise after conclusion of the pleadings may, also in some cases, cause the legality to undergo some change. Yet such changes can be accommodated by allowing adjustments to pleadings, and the position of the denier can be protected by utilising the discretion which the court has in granting interdict [34].

It has been contended that a contract cannot move from void to valid and vice versa [35]. However, this problem is solved on a theoretical level by the approach which the courts now clearly follow in South Africa. In *Magna Alloys* Rabie CJ submitted that the question in these cases concerned *enforceability,* and he therefore concluded that the court had to ask whether it would lend its machinery to the enforcer at the time when it is asked to do so [36].

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32. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 331.
33. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330.
34. Commercial & Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 234 see the discussion infra Ch 15.1.1; See also on partial enforcement Schoombee 132.
35. Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1377; See already Benwell v Inns (1857) 24 Beav 307 at 311; Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 489, 493; Cheshire Fifoot and Furmston 406; McBryde 604; Walker 185.
36. Magna Alloys 894-895; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 312; Book v Davidson 1989 (1) SA 638 (ZS) 642-643; Schoombee 147; Christie 437; See Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at

4.2. The importance of the contract as a planning device

Parties have to be able to plan their contractual relationships for the future on the basis of events at conclusion, and it will lead to uncertainty and confusion if later events are considered in determining effectiveness. The position of the covenantor is not as problematic. The courts will be very critical of a covenantor who plans for ineffectiveness [37] (even though it might be quite common in practice). But the planning of the covenantee for an effective restraint from the moment of conclusion must not be undermined without good reason.

The principle that the agreement is only unenforceable [38] is a theoretically satisfying explanation for considering post-conclusion events. The emphasis on remedy makes it possible to stress the time at which remedies should be granted [39], but it leaves lingering doubts [40]. It does not address the real practical dilemma mentioned in the other legal systems. Yet there are two ways in which these problems can be solved.

Legality should, firstly, not be determined by only narrowly looking at a precise point in time. Unforeseeable facts should be considered on a different plane from foreseeable facts. The courts should accept that certain events were not foreseeable from the moment of conclusion. They should be more reluctant to base decisions on such issues [41]. In *J Louw* [42] Didcott J carefully stated that "account must also be taken of what has happened since then [that is since the time of contracting] and, in particular, of the situation prevailing at the time enforcement is sought". Rabie CJ explicitly stated in *Magna Alloys* [43] that too narrow a view must not be taken of the time at which reasonableness should be determined.

The doctrine will, secondly, have to adapt in other respects if the reasonableness is determined at the time when the court is asked to enforce the restraint. A more flexible approach towards

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489, Bridge LJ did not seem to understand this point as put forward by Lord Denning, Russell 584 his criticism of Lord Denning cannot be accepted.

37. Magna Alloys 896; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313; Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 506.

38. See supra Ch 12.

39. Schoombee 147 and his comparison with the Roman Praetor and the English Chancellor; Christie 437.

40. Lubbe and Murray 261 n13.

41. See Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 489 he proposed a two stage process.

42. J Louw and Co (Pty) Ltd v Richter 1987 (2) SA 237 (N) 243.

43. Magna Alloys 895.

severability was taken in *Magna Alloys,* and this will play an important role in ensuring that unforeseeable events are properly accommodated [44].

The new approach in South Africa may, even with all these protective mechanisms, leave the covenantee in an unsatisfactory position in a small minority of cases. In such cases the general theoretical position of Rabie CJ in *Magna Alloys* comes to the fore. Restraint of trade remains a public policy issue. The courts should do everything in their power to ensure that the doctrine does not work unfairly, but public interest is the conclusive aspect, and that should be the public interest at the moment when the case comes to court. Public interest must be determined in the most up to date manner, to ensure that such interests are properly and not unnecessarily guarded.

4.3. Uncertainty

Parties may be unclear about their legal position at any particular stage after conclusion of the restraint because the restraint may oscillate between legality and illegality [45]. King J in *Allied Electrical* stated [46]: "If a contract is invalid at one point but valid at another point in time the contracting parties would be like tennis players playing a game of tennis according to the rules of the game but with a constantly moving base line". The proverbial base line will in most cases move very gradually if it moves at all [47]. However, it is still conceivable that it will in some cases produce foot-faulting parties.

The theoretical change made in South Africa will play an important role in countering these arguments. The restraint will only shuttle between enforceability and unenforceability and not between validity and voidness. However, many practical problems will remain:

- The covenantee may find it very difficult to establish whether the covenantor is subject to the restraint at any particular stage. It will be difficult to determine for how long the restraint will be reasonable if he regards it as reasonable. The covenantee may find it difficult to determine when and if a restraint will become enforceable again if it has been unenforceable for a certain period. The enforcer in South Africa can probably attempt to enforce the restraint partially to ensure that he gains something from it, but it will still be problematic in some cases.

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44. There is an indication that Lubbe and Murray 262 was sensitive to this connection.
45. Apparently Elves v Crofts (1850) 10 CB 241 at 260 at 260; Aling and Streak v Olivier 1949 (1) SA 215 (T) 219, 225; See also Treitel 401.
46. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 330; Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 492.
47. A case like Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 is quite exceptional.

- Real difficulties will exist where the denier attempts to plan his affairs at a later stage. He may also find it difficult to determine for how long he will be bound if he regards the restraint as legal, and he must guard against a restraint that will rise from the dead to haunt him if he does not. Difficulty will be enhanced if it is within the power of the covenantee to make the restraint reasonable again [48].

These problems will be cushioned to some extent:

- The South African courts will firstly, probably not allow partial enforcement where it will prejudice the denier unreasonably [49].
- The discretion to grant specific performance may be utilised to achieve a fair result [50].
- The court will hesitate to accept that certain facts will change the status of a restraint where it will be particularly harsh on one party.
- Uncertainty will be reduced once the parties have asked the court to decide the issue.
- The behaviour of the parties after conclusion of the contract will have to be considered.

The last two points require expansion.

4.4. Final settlement of disputes by the court

In *Shell* [51] Bridge LJ maintained that remedies will be problematic in cases where a restraint is ineffective but may become effective again. He stated that it will often not be possible for the court to show when and in what circumstances the restraint will become effective again. However, the new approach in South Africa can accommodate these problems. The changes merely have the effect that reasonableness will be determined from the time at which the court is asked to enforce it. The court will have to determine reasonableness at this point in the same manner as they used to do from the moment of conclusion. They should ask themselves if possible future events that are likely to take place after they have been asked to enforce it should make the restraint either effective or ineffective, and then they must give one final decision.

Schoombee [52], although cautious, suggested that the current approach towards the status of an illegal restraint and the time at which reasonableness will be determined may make it possible to

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48. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 493, See Russell 584; Kerr (1982) 187 and his reservations.
49. See infra Ch 14.5.
50. See infra Ch 15.
51. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 494, See also Russell 584; Probably the second criticism in Elves v Crofts (1850) 10 CB 241 at 260 was aimed at this.
52. Schoombee 147; See Kerr *Tribute* 196-197, See the criticism supra Ch 12.3; Cf Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 492 and the interpretation of the decision of Denning LJ.

re-open a restraint of trade case [53]. Yet it is doubtful whether this conclusion can be accepted on the South African approach. The new stance in South Africa is not that all unforeseeable events influencing reasonableness after conclusion of the contract will have to influence the legality of the contract at all times. The changes are decision based. This is inherent in the stress which *Magna Alloys* placed on the time at which the court is asked to *enforce* the restraint. It envisages that the most up to date decision on the restraint is made when the restraint comes before the court. It gives courts a power to suspend a contract in the sense that a judge may declare a restraint unenforceable even if it is clear that there was a time when the restraint was enforceable. It allows courts to enforce restraints that were unenforceable at some stage. But it does not give a power to suspend previous decisions or the ability to re-open a case if circumstances, which were unforeseeable at the first case, take place. To this extent the solution proposed in *Magna Alloys* seems to be an improvement on the suggestions which Lord Denning made on exceptional facts in *Lostock*.

The policy that underlies the principle of res judicata is probably not sufficiently shifted by the new South African approach towards restraints. It will undermine the certainty and effect of court judgments if such judgments can be re-opened. Public policy in South Africa must be determined as realistically as possible after *Magna Alloys,* but this probably still means that it must be realistically determined in a particular case. Future circumstances can be discounted by looking at events that are foreseeable from the time when the court is asked to enforce the restraint [54].

4.5. Events in context

Future events should be evaluated by looking at the behaviour of the parties after conclusion of the contract. There will be no difficulty where the change that has taken place does not alter the position between the parties. But complex fairness issues will arise where the parties acted in accordance with the legal position that preceded the intervening event.

An interceding event that in isolation would cause a restraint to be reasonable will often work unfairly against the covenantor if the parties had previously and rightly ignored it because it was ineffective. The court will probably only consider a change of circumstances if:

- It would not cause hardship to the covenantor where he organised his affairs in accordance with the previous position before it had changed.

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[53]. With reference to: Le Roux v Le Roux 1967 (1) SA 446 (A) 462-463, Spencer Bower & Turner *The Doctrine of Res Judicata* (1969) par 172-173.

[54]. Magna Alloys 895; Van der Merwe 158.

- Not doing so would place the covenantee in an untenable position because he acted on the enforceability at a time when it was already foreseeable that it would be substantially legal.

An intervening event that would in abstracto cause the contract to be ineffective may cause hardship to the covenantee if the parties had previously acted in terms of it. The question of hardship to the covenantee will now become a factor that will probably lead to the restraint still being enforced at the time when the court is asked to do so. One of the problems for a covenantee in a case with facts like *Shell* [55] would accordingly be to show such prejudice. It will probably be difficult to convince the courts of this.

A specific restraint may theoretically oscillate between acceptability and ineffectiveness an infinite number of times. But the basic principles will remain the same. Reasonableness will have to be determined at the trial, and it will have to be established with reference to the manner in which the relationship between the parties has progressed. The *Magna Alloys* approach will allow the courts to strike the best possible compromise between the interests of the parties and a realistic determination of the interests of the public. However, three criticisms can still be levelled at it.

It may be suggested that this whole process is open to abuse by the sly against the unwary. However, the reasonableness issue should also involve the consideration of these issues. It will definitely weigh heavily if it is shown that one of the parties cynically tried to abuse the rules and principles regarding the time at which reasonableness of the restraint should be determined.

It may be suggested, with some justification, that the *Magna Alloys* approach can lead to increased conflict in restraint of trade relationships. The above mentioned solutions will serve as little consolation to the majority of contracting parties who do not intend or cannot go to court on their restraints. But from the point at which their relationships are at a given time the parties will have to examine their positions by taking a broad overview of possible intervening events with the potential to change the status of the contract. The previous behaviour will have to play an important role in the resolution of disputes between them. The way in which the courts will approach these cases should also impact on the manner in which parties sort out their conflicts regarding restraint of trade clauses when they do not go to court.

It can finally be said that this approach stacks the odds against the enforcer. It will probably be quite easy for the covenantor to show that the change of the status quo position will seriously prejudice him where the intervening event in isolation would cause unreasonableness. Yet it will

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[55]. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481.

mostly be more difficult for the covenantee to show that the restraint should be enforced although an intervening event ceteris paribus would make the restraint reasonable. But this cannot be helped in a legal system that stresses freedom of work. The work principle and the need for the covenantor to be able to organise his work affairs will dominate. Courts should nevertheless keep this issue in mind. The interests of the employee must also be carefully guarded.

4.6. The time at which reasonableness should be determined: a final conclusion

It is unrealistic and artificial to expect restraint of trade principles to iron out all the creases that exist because a restraint runs over a period of time [56]. Parties will merely have to accept that legality may be buffeted about by the winds of change. The new approach in South Africa will create some problems, but it will be more acceptable than the artificial stance in Scotland and England. It might be accepted in these jurisdictions although it would mean defying stare decisis [57].

[56]. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 312.
[57]. This was a strong objection Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 492, 493.

Chapter 14

The wider impact of ineffectiveness on a contract: especially severability

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1. The wider impact of ineffectiveness of a restraint or fragments of a restraint on the effectiveness of the rest of a contractual relationship

It is difficult to determine how the ineffectiveness of a particular clause will affect the rest of the contract. Three scenarios must be clearly distinguished for the purpose [1].

- It might sometimes be difficult to determine whether other obligations concluded by the parties will be effective if the restraint is ineffective [2]. It has been stated that the question is whether the ineffective restraint is substantial consideration for other promises [3]. But this test should only be applied in severance of consideration cases [4]. A more precise and direct test would determine whether the main subject matter has been torn out of the contract [5].
- Courts will sometimes have to determine whether an obligation should be ineffective because it is consideration for an ineffective restraint. They must avoid unjustified gains for the covenantor [6]. Judges have accepted that obligations cannot be enforced if they are made

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1. See the distinctions: Alec Lobb Ltd (Garages) Ltd v Total Oil (GB) Ltd [1985] 1 WLR 173 at 186, 191; Treitel 446, 451; Cheshire Fifoot and Furmston 359, 421-422; Cf also Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 167-168, 170 severability will not be allowed if the whole agreement is ineffective although it is doubtful whether it was correct on the facts.

2. Wallis v Day (1837) 2 M & W 273 at 281; Horwood v Millar's Timber and Trading Co Ltd [1917] 1 KB 305 at 312, 314-315, 318-319; Rawlings v General Trading Co [1921] 1 KB 635 at 652; Rolfe v Rolfe (1846) 15 Sim 88; Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 2 All ER 657 at 688; Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1966] QB 514 at 579-580; Esso 321, 571 567; Petrofina (GB) Ltd v Martin [1966] 1 All ER 126 at 134, 137, 138; Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1975] AC 571 578-579 although the court here did not choose between the different possible tests, Cf Bowman 573; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 403; Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd [1983] 1 WLR 87 at 107 but see the rejection on appeal 188, Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd [1985] 1 WLR 173 at 180-181, 187-188, 191-192; Cf Gurry 219 stated that contracts will be enforceable in other respects if ineffective restraints are unenforceable. This is unacceptable; On the distinction between restraint of trade aspects and other aspects of trade unions: Swaine v Wilson (1889) 24 QBD 252 at 257, 260, 261, 263, Hornby v Close (1867) LR 2 QB 153 at 158, 159, 160 although it is unclear to what extent the decision was influenced by legislation that was relevant here, Sayer v The Amalgamated Society of Carpenters and Joiners (1903) 19 TLR 122 at 123, Burke v Amalgamated Society of Dyers [1906] 2 KB 583 at 590, Gozney v Bristol Trade & Provident Society [1909] 1 KB 901 at 910, 912, 918-919, 921, 925, Mudd v General Union of Operative Carpenters & Joiners (1910) 26 TLR 518 at 519, Russell v Amalgamated Society of Carpenters & Joiners [1910] 1 KB 506 at 516, 518-519, 523-524, 528, Russell v Amalgamated Society of Carpenters & Joiners [1912] AC 421 at 435-437, 437, 441-442, Osborne v Amalgamated Society of Railway Servants [1911] 1 Ch 540 at 553, Thomas v Portsmouth "A" Branch of the Ship Constructive Association (1912) 28 TLR 372 at 374, Miller v Amalgamated Engineering Union [1938] 1 Ch 669 at 685-686, See the discussion of these cases Chitty 16-169; Gloag 511; McBryde 590 simply accepted that a contract will remain effective even if a restraint is illegal but this is too wide as a general proposition, See the more balanced view 606, 608, Cf also the general discussion 619-620; Walker 191.

3. Cheshire Fifoot and Furmston 422, Chitty 16-170 although the more acceptable question was asked under the consideration head; Gurry 219 accepted that "the contract will fail in toto" if it is the whole or main consideration on the part of the person restrained; Walker 191.

4. Treitel 452; See Christie *Encyclopaedia* 601.

5. Treitel 451; Chitty 16-170 but see the criticism supra; See also Anson 359-360 for a further possible solution.

6. Cf Esso 295.

wholly or substantially in consideration for the ineffective restrictions [7]. Conversely, the courts should allow enforcement of an obligation where the restraint is clearly insubstantial consideration for it. It will be disproportionate to force a covenantor to perform an ineffective restraint before he can get any counter-performance if the restraint only plays a very small role as consideration. But it might become difficult to draw lines. Enforcement of counter-obligations might still work unfairly towards the covenantee if he has to perform obligations for which part, albeit a small part, of the consideration has fallen away [8]. It would be ideal if the courts could flexibly reduce counter-obligations, but this will be problematic. It will probably be more acceptable, in marginal cases, to take a narrow view of this form of severability and to leave these cases to be solved by the notions of relative enforceability [9].

- In the third type of case the question will be whether a restraint may still be effective even though parts of it are ineffective for being in restraint of trade. This is the one question to which attention will be paid in this chapter.

2. Severability and partial enforcement of different restraints or different parts of restraints

Severability and partial enforcement issues are extremely problematic. It may, accordingly, be argued that severability should be narrowly applied because there are sufficient alternative methods for limiting the scope of a restraint; but none of the alternative devices for limiting restraints make severability redundant.

- Interpretation will play an important limiting role, but it will be constrained by the words that the parties used [10].
- Implied protection of trade secrets and goodwill provided by law is often inadequate [11].
- Interdicts or injunctions to enforce parts of clauses will only be accepted where the whole is effective or the part is severable [12].

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[7]. Wyatt v Kreglinger and Fernau [1933] 1 KB 793 at 808; In Re Prudential Assurance Co's Deed [1934] 1 Ch 338 at 341-342; Bull v Pitney-Bowes Ltd [1967] 1 WLR 273 at 284-285 although it was not necessary to decide these issues in the particular case, See Cheshire Fifoot and Furmston 410, Heydon 291; Spence v Mercantile Bank of India Ltd (1921) 37 TLR 390 severability was not discussed but the court regarded a restrictive condition as severable; Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388 at 391-392 especially 392; Anson 357 did not properly distinguish this issue; Cheshire Fifoot and Furmston 422 but see the criticism supra; Chitty 16-170; Heydon 280, 291; Treitel 446-447; Winfield 327.

[8]. Heydon 292.

[9]. See supra Ch 12.4.

[10]. Trebilcock 74, 243; See on the comparison with interpretation: Mills v Dunham [1891] 1 Ch 576 at 580, Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1486.

[11]. See the criticism of Kerr (1982) 188 of National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1107.

Severability will therefore continue to play a fundamentally important role in the restraint of trade field.

The position regarding severability in Scotland, England and pre-*Magna Alloys* South Africa is opaque [13]. Ineffective aspects can only be severed from restraint of trade clauses under very specific conditions. However, it is unclear what these circumstances are. This is an attempt to present this area of law systematically. Some standard phrases, like "blue pencil test" and "notional" or "grammatical" severability, have therefore been avoided as they have become unmanageable.

3. The orthodox approach: England and Scotland

The English courts initially severed parts of clauses that were ineffective without investigating a theoretical basis and limits; very formal rules were followed [14]. However, more substantive grounds have now been laid down:

- Despite some dissents [15], it is trite that parts that are too wide will only be deleted; words, or the word order of a restraint clause, will not be altered [16].

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[12]. Infra Ch 15.1.3.

[13]. Carney v Herbert [1985] 1 AC 301 at 309; Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1975] AC 571 578; Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 168; Anson 357; Christie *Encyclopaedia* 601; McBryde 605 stated that many different tests have been formulated but that no single formulation can be made; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1111-1112.

[14]. Chesman v Nainby (1727) 2 Str 739; Mallan v May (1843) 11 M & W 653 at 669; Tallis v Tallis (1853) 1 E & B 391 at 412 although the severability and remedy issues were not clearly distinguished; Green v Price (1845) 13 M & W 695 at 699; Price v Green (1847) 16 M & W 346 at 352, But see the explanation Baker v Hedgecock (1888) 39 ChD 520 at 522-523; Nicholls v Stretton (1847) 10 QB 346, But see the discussions Baines v Geary (1887) 35 ChD 154 at 159-160, Baker v Hedgecock supra; Bishop v Kitchin (1868) 38 LJQB 20; Davies Turner & Co v Lowen (1891) 64 LT 655 at 656, See Hooper & Ashby v Willis (1905) 21 TLR 691 at 692 where a wide view of this cases was taken; Rogers v Maddocks [1892] 3 Ch 346 at 358-359 and Nordenfelt 561, But see the interpretation E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 305; Bromley v Smith [1909] 2 KB 235 at 241 although more specific requirements started to surface; William Robinson & Co Ltd v Heuer [1898] 2 Ch 451 at 459 although the court here was probably not dealing with severability proper; Lewis & Lewis v Durnford (1907) 24 TLR 64; Goldsoll v Goldman [1915] 1 Ch 292 at 297-298, 299, 300-301; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 572-573 but see infra, Christie *Encyclopaedia* 601-602; For more modern authorities where a too wide view was taken: Putsman v Taylor [1927] 1 KB 637 at 647, Routh v Jones [1947] 1 All ER 179 at 183. See the criticism of Marsh 364. The court on appeal Routh v Jones [1947] 1 All ER 758 at 760, 763 did not confirm or reject the approach of the court a quo but it expressed doubts 764; The principles were not properly considered in Scorer v Seymour Jones [1966] 1 WLR 1419 at 1427, 1422 and 1424; Some parts of Chitty 16-168; See Marsh 352-355 although the author adhered to a broader interpretation of "formal".

[15]. Cf Bryson v Whitehead (1822) 1 Sim & St 74 at 77 where the restraint in a deed that was executed in terms of an agreement was set down in more limited terms than was provided for in the agreement. Both parties were willing that the agreement should be so modified; Baines v Geary (1887) 35 ChD 154 relying on Price v Green and Nicholl v Stretton ibid although none of them went this far, See Dubowski & Sons v Goldstein [1896] 1 QB 478 at 486 where the correctness of this case was doubted, See Continental Tyre and Rubber (GB) Co Ltd v Heath [1913] 29 TLR 308 at 310 accepted that Baines conflicted with Baker v Hedgecock infra, Express Dairy Co Ltd v Jackson

- Courts will only allow severance by deleting if it does not change the meaning of what remains; the effective part must be independent [17].
- Only clauses that the parties regarded as independent may be severed. Severance will only be allowed if the parties agreed to separate covenants; it will not take place where it alters the "scope and intention of the agreement" [18], or where there is in truth but one and not two separate covenants [19].

(1930) 46 TLR 147 at 149 also attempted to show that Baines was of doubtful authority see Chitty 16-168. See the narrow interpretations although it is difficult to see how they can be justified: Baker v Hedgecock (1888) 39 ChD 520, Perls v Saalfeld [1892] 2 Ch 149 at 156-157, E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 305, Chard v Hammond (1904) 48 Sol Jo 773, Winfield 327; Dubowski & Sons v Goldstein [1896] 1 QB 478 at 483-484, 483 where Lord Esher decided that he was not bound by Baines v Geary but that he had to decide the case on principle. He did however apply Baines v Geary principles, See the criticism Express Dairy Co Ltd v Jackson (1930) 46 TLR 147 at 149; Mulvein v Murray 1908 SC 528 at 532-533, See however Lord Ardwall 534. See Heydon 284 preferred the former.

[16]. Baker v Hedgecock (1888) 39 ChD 520; Mills v Dunham [1891] 1 Ch 576 at 580. Although the issue was not decided on the facts here 581 and see the Appeal 587; Woods v Thornburn (1897) 41 Sol Jo 756 although it was not discussed in these terms; Putsman v Taylor [1927] 1 KB 637 at 640; Continental Tyre and Rubber (GB) Co Ltd v Heath [1913] 29 TLR 308 at 310, Eastes v Russ [1914] 1 Ch 468 at 477; Konski v Peet [1915] 1 Ch 530 at 539; Hepworth Manufacturing Co Ltd v Ryott [1920] 1 Ch 1 at 12; Express Dairy Co Ltd v Jackson (1930) 46 TLR 147 at 149 and M & S Drapers v Reynolds [1956] 3 All ER 814 at 820 probably all failed on this ground although principles were not clearly expressed; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 647; T Lucas & Co Ltd v Mitchell [1974] Ch 129 at 135-137; Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 at 1486; Anson 357; Cheshire Fifoot and Furmston 422-423; Chitty 16-167; Gooderson 424; Trebilcock 73; Treitel 449; Although it is not clear British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68; Walker 191.

[17]. Baker v Hedgecock (1888) 39 ChD 520; Perls v Saalfeld [1892] 2 Ch 149 at 156-157; E Underwood & Son Ltd v Barker [1899] 1 Ch 300 at 304; Haynes v Doman [1899] 2 Ch 13 at 24-25; Mason 742; Attwood v Lamont [1920] 3 KB 571 at 593, 577 but see the criticism infra 3.1; Gaumont-British Picture Corp Ltd v Alexander [1936] 2 All ER 1686 at 1692 although it was not discussed in detail; Routh v Jones [1947] 1 All ER 179 182, 183, See Marsh 364; Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 385; Chitty 167; See the criticism of Davies Turner in Gare *The Restraint of Trade Doctrine* (1935) and the comments Gooderson 424 who said the criticisms were unfair; Gooderson 424; Anson 357; Cheshire Fifoot and Furmston 423 although this is not properly distinguished from further elements; Meikle v Meikle (1895) 3 SLT 204; Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71; The criticism of Bluebell Apparel Ltd v Dickinson 1978 SC 16 by Forte 21-22 is too narrow; Walker 191.

[18]. Inherent in Mason 745, See Marsh 356; Attwood v Lamont [1920] 3 KB 571 at 580; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563 at 573 but see the criticism supra, Cf also the criticism Marsh 361-362; Clarke Sharp and Co Ltd v Solomon (1921) 37 TLR 176 at 178 Atkin LJ leaned towards this view, It is not clear whether Bankes LJ denied severance in this case on this or the previous ground although it seems the emphasis was on the previously mentioned ground; Putsman v Taylor [1927] 1 KB 637 at 640; Routh v Jones [1947] 1 All ER 179 at 182-183 although the case can in places be submitted to the same criticism as British Reinforced Concrete, See the criticism of Marsh 364; Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 168; Anson 358; Chitty 16-168; Farwell 70-71; Gurry 286; Gooderson 424; Heydon 280ff; Treitel 449-451; Winfield 327; Christie *Jur Rev* 301 said that the courts would separate unless the restriction was framed as a unity. This is correct although it is approached from the wrong end; Goldsoll v Goldman [1915] 1 Ch 292 is often used to explain the modern doctrine: Chitty 16-168, Cheshire Fifoot and Furmston 425-426, Treitel 449-450 but the case itself was not clearly decided on such grounds, Goldsoll 296 was even critical of Mason, Only Swinfen Eady 301 came close to discussing further issues, Cf Express Dairy Co Ltd v Jackson (1930) 46 TLR 147 at 149 where the court accepted that the doctrine was applied very liberally in Goldsoll. An attempt was however made in Express to justify the wider approach in Goldsoll, See also the explanation Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 269-270 on the basis that Goldsoll concerned a sale of goodwill while Attwood concerned post-employment,

Recent English cases have again confirmed these principles. In *Systems Reliability* [20] the second requirement was emphasised, and in *Business Seating* all the different elements of the severability test were clearly set out by the court [21].

3.1. Is there a further requirement?

It is, furthermore, problematic to determine whether the law also requires that only trivial parts of clauses can be severed. In *Mason* Lord Moulton [22] stated that:

> "the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical and not a part of the main purport and substance of the clause".

He continued:

> "It would ... be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required".

It is, however, not clear whether it was merely perceived as a requirement for determining whether a certain aspect was indeed so separate that it could be severed [23], or if it was intended as a further requirement.

See infra 3.1, Heydon 281 merely referred to this case as an example of the principle that the court will only delete from a clause.

19. First mooted in Baker v Hedgecock (1888) 39 ChD 520 at 523; Caribonum Co Ltd v Le Couch (1913) 109 LT 385 at 388; SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 at 423; Ropeways Ltd v Hoyle (1919) 120 LT 538 at 540; Attwood v Lamont [1920] 3 KB 571 at 593, 578 although it is not consistent with 577, See Marsh 360-361 is too narrow; Putsman v Taylor [1927] 1 KB 637 at 640-641, 646-647, Treitel 449 cannot be accepted, See Marsh 362-363; Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 647; T Lucas & Co Ltd v Mitchell [1974] Ch 129 at 135-137, Applied in Anscombe & Ringland v Butchoff (1984) 134 NLJ 37; Stenhouse Australia Ltd v Phillips [1974] AC 391 at 403; Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 487; See the criticism of Anson 359; Chitty 16-168; See Trebilcock 74; Mulvein v Murray 1908 SC 528 and see the two distinct restraints especially 532, 534, See the comments of Gloag 574 are probably too general; See Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 453 where there were clearly separate restrictions; This has been emphasised by Scottish authors: Gloag 574, McBryde 605, Scott Robinson 156-157, Walker 191, Woolman 254.

20. Systems Reliability Holdings plc v Smith [1990] IRLR 377 at 385.

21. Business Seating Ltd v Broad [1989] ICR 729 at 734-735, Davies 499.

22. Mason 745; See Marsh 357; See Trebilcock 72-73.

23. See Putsman v Taylor [1927] 1 KB 637 at 646 and SV Nevanas & Co v Walker Foreman [1914] 1 Ch 413 at 422; See the discussion infra.

Younger LJ in *Attwood* [24] took up the issue. The judge firstly emphasised that the court should be slow to accept that a restriction is severable in employment cases. He required that severance should not "in the general case be allowed". But he also went one step further. He noted that severability in these cases cannot merely be allowed where severance can technically be made, and he then quoted the statement of Lord Moulton in *Mason* mentioned above. The point made in *Mason* was apparently viewed as a further requirement for severance, although Younger LJ expressly limited his decision to employment contracts, leaving open the position as to sale of goodwill restraints.

Heydon [25] therefore accepted that the courts will treat employment contracts differently from sale of goodwill agreements when it comes to severability. The author confirmed the existence of a further requirement expressed above, although he also acknowledged that the same principle was not applied in sale of goodwill cases [26]. This last point is correct in so far as it is accepted that the third requirement does not apply to sale of goodwill restrictions. The careful limitation of the principles in *Mason* to employment contracts, and the reservations which Younger LJ in *Attwood* had about applying these principles to all contracts, became settled law in later cases.

Yet it is doubtful whether this principle will still apply even in employment cases. Authority leans against accepting a further and separate requirement:

- Even before *Attwood* the court in *SV Nevanas* [27] decided that there would be no further requirement if different parts of the clause were expressed in such a way that it amounted to severance by the parties. Sargant J contended that a third requirement was not stated in *Mason,* and that the court was merely disclaiming a wider approach. He suggested that the second part of the dictum concerning trivial aspects was merely a call for realistic interpretation [28].
- The *SV Nevanas* case was rejected by Lord Younger in *Attwood* [29], but Lord Sterndale [30] seemed to have been satisfied with it.
- After *Attwood* the approach was expressly rejected in *Putsman* [31] and especially in *T Lucas* [32], where the court was critical of its development.

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24. Attwood v Lamont [1920] 3 KB 571 at 593-595, See Christie *Encyclopaedia* 602; See Gloag 574.
25. Heydon 283; Trebilcock 72, Cf also 242 this was not always done; See Christie *Encyclopaedia* 602 it would "especially" impact on employment contracts.
26. See British Reinforced Concrete v Shelff [1921] 2 Ch 563 at 572-573 Younger LJ did not apply the requirement he had himself helped develop; See Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 270 although it is not clear which of the principles enumerated in Attwood is being distinguished, See Treitel 450.
27. SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 at 422-423, Marsh 357-358.
28. SV Nevanas & Co v Walker and Foreman [1914] 1 Ch 413 at 423.
29. Attwood v Lamont [1920] 3 KB 571 at 595.
30. Attwood v Lamont [1920] 3 KB 571 at 577.

Heydon admitted that there are cases where more than trivial aspects were severed [33]. He conceded in a later article that there probably is no further requirement [34].

Many of the cases that may be invoked to support such a prerequisite can be explained away or criticised.

- *Horwood* [35] concerned a different type of situation. Here the issue was whether the contract could exist if the whole of a restrictive clause was struck out [36].
- In *Rex Stewart* [37] the dictum of Lord Moulton in *Mason* was quoted but the court did not apply it to the facts of the case. The issue was not specifically decided but Glidewell LJ appeared to prefer the authorities where this further requirement was rejected or ignored. The judge only emphasised other requirements.
- In *Living Design* [38] Lord Coulsfield apparently thought that the further requirement still formed part of Scots law, but the court did not look at the further developments that had taken place in England since *Mason*.

There is some sense in the *Attwood* case, and this should be built upon:

- The attitude of courts - and it cannot be more strongly put - towards severability should perhaps still be influenced by the relative bargaining and financial strength of the parties [39]. The relevant factors like bargaining power will have to be investigated as such. But courts should be more reluctant to cut down restraints that are drawn up in terrorem, although this cannot apply consistently to one type of contract [40].
- Importance of part of a restraint will be a pivotal indicator that the ineffective part is not properly severable according to other requirements.

Yet it would be unacceptable to add triviality as a further requirement.

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31. Putsman v Taylor [1927] 1 KB 637 at 640-641, 643, 645-646.
32. T Lucas & Co Ltd v Mitchell [1974] Ch 129 at 135-137; Gurry 224; Treitel 450.
33. Heydon 283, The test was not mentioned in most of the restraint cases: Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 647, Scorer v Seymour Jones [1966] 1 WLR 1419 at 1422, 1424, Stenhouse Australia Ltd v Phillips [1974] AC 391 at 403, Anscombe & Ringland v Butchoff (1984) 134 NLJ 37, Business Seating (Renovations) Ltd v Broad [1989] ICR 729 at 734-735; Chitty 16-172; Anson 356 but see infra.
34. Heydon *McGill* 357; Davies 499.
35. Horwood v Millar's Timber and Trading Co Ltd [1917] 1 KB 305 at 318-319; See also Goldsoll v Goldman [1915] 1 Ch 292 at 299 although it is not clear, Marsh 359 does not assist; See also Ropeways Ltd v Hoyle (1919) 120 LT 538 at 540; Express Dairy Co Ltd v Jackson (1930) 46 TLR 147 at 149 mentioned but not applied on the facts; Jenkins v Reid [1948] 1 All ER 471 at 481 where it was not necessary to make any final decision although the court doubted it; Heydon 283 relied on this and the Jenkins case.
36. Marsh 359.
37. Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 487.
38. Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71.
39. Routh v Jones [1947] 1 All ER 179 at 183-184 although too much emphasis was placed on the employer/employee distinction; Cf Cheshire Fifoot and Furmston 426; Cf Anson 356.
40. Silvertone Records Ltd v Mountfield [1993] EMLR 152 at 168, 170.

3.2. Severability and separate consideration

In *Putsman* [41] Salter J accepted that separate consideration would be a distinct requirement although he did not have to go into it on the facts of the case. On the other hand Treitel [42] rejects this view. He does not elaborate his criticism, but he refers to *Goldsoll* [43] as a case where severance was allowed although there was no separate consideration for the restraint. In *Price* [44] the court accepted that consideration was paid for the restraint. It was acknowledged that the price paid might have been smaller if the restraint had been narrowed down, but the issue under discussion here was not really analysed. The court gave three reasons why severance could still take place:

- The point was only conjecture. This will certainly be a problem in many of these cases. It will often be difficult to establish to what extent a restraint relates to consideration.
- It was a covenant under seal and consideration was not necessary. Consideration is not necessary on bonds, but that should be separated from the question whether part of a restraint in a bond that is made for a specific consideration can be maintained if it is struck down to the extent that it cannot be properly related to consideration any more [45].
- The ineffective part would only be "void" and not "illegal". This statement is difficult to understand and has already been criticised [46]. It seems that the court held that the extent to which public policy is offended by an unreasonable restraint is not so great that consideration could be affected by it. Yet this notion has certainly been rejected by other authorities [47].

There are no cases where these issues were really discussed. However, it is conceivable that it may, in some cases, be problematic, and the difficulties will be exacerbated by the demise of the requirement that a severable restraint must be trivial. A court will not allow severability where:

- The restraint was precisely quantitatively related to every aspect of counter-performance.
- The counter-performance cannot be divided into different parts, or where acceptable and ineffective parts of the restraint cannot be alternative sufficient considerations for counter-performance.

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41. Putsman v Taylor [1927] 1 KB 637 at 640.
42. Treitel 450.
43. Goldsoll v Goldman [1915] 1 Ch 292.
44. Price v Green (1847) 16 M & W 346 at 354; See the criticism of Marsh 353 n90.
45. See Marsh 353.
46. Supra Ch 2.1.
47. See supra 1.

- Neither the effective nor the ineffective part is clearly substantial consideration for counter-performance. The problem may, for instance, come to the fore in garden leave cases where an employee is being paid merely for submitting himself to a restraint for a certain time at the end of his employment.

The nature, extent, and function of consideration could accordingly be of great importance in determining severability. But it is doubtful whether it will be necessary to state this as a separate requirement. The issue of consideration will, conceivably, be an important factor that will be considered in answering the third requirement mentioned above. A court will probably find that ineffective parts of restraints will not be severable if precise and indivisible consideration is given for both the legal and ineffective parts of the restraint.

4. Severability in South Africa before Magna Alloys and Chemsearch

Courts in South Africa before *Chemsearch* and *Magna Alloys* followed principles that are very similar to those that apply in England. It was regarded as the minimum requirement that the court would not change or add words to a contract, but it was also emphasised that severance could be made if some separation was made by the parties themselves [48]. The third requirement proposed by Younger LJ in *Attwood* [49] was emphatically rejected in South Africa in *Brooks* [50], although it was incorrectly assumed that the court in that case proposed a requirement for all types of restraints.

5. The partial enforcement approach: Chemsearch and Magna Alloys

However, the courts in South Africa have now developed a different approach [51]. They have accepted that the question in a restraint of trade case is one that pertains to *enforceability* [52] at the *time when the restraint is brought before the court* [53]. Hence they have stressed that the problem

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48. KWV van ZA Bpk v Botha 1923 CPD 429 at 436-437 at 441; African Theatres Ltd v D'Oliviera 1927 WLD 122 at 127-128; Gordon v Van Blerk 1927 TPD 770 at 776; Empire Theatres Co Ltd v Lamor 1910 WLD 289 at 292; New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 81-82 and Brooks and Wynberg v New United Yeast Distributors (Pty) Ltd 1936 TPD 296 at 303; Pieterse v Cilliers 1945 (2) PH A.31 53 at 54; Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd 1946 WLD 140 at 154 where the basis for reasonableness was not really discussed; Tolgate Holdings Ltd v Olds 1968 (2) PH A.78 (W); Katz v Efthimiou 1948 (4) SA 603 (O) 611-612; Cowan v Pomeroy 1952 (3) SA 645 (C) 652; Filmer v Van Straaten 1965 (2) SA 575 (W) 579; Christie 438-439; Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 80; Schoombee 131.

49. Supra 3.1.

50. New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 80ff with reference to Nevanas, Goldsoll and Putsman; Cf Tolgate Holdings Ltd v Olds 1968 (2) PH A.78 (W) where it was stressed that a certain part was also minor, *Annual Survey* (1968) 101.

51. Van der Merwe 230; See Heydon *McGill* 360 also suggested a more flexible approach in other legal systems.

52. Supra Ch 12.

53. Supra Ch 13.

here is one of "partial enforcement" rather than "severability". In the Appeal Court in *Magna Alloys* Rabie CJ also supported the partial enforcement principle [54], although the issue was not discussed in any detail because it was not relevant in the case. The only qualification mentioned was that partial enforcement had to take place in the light of public interest [55]. Hence, the general principle was really developed in Provincial cases that preceded *Magna Alloys* [56]. *Magna Alloys* is only important for accepting partial enforcement in principle. The issue was more deeply analysed in other decisions before and after it.

On the one hand the radical view in *Drewtons* [57] must be approached with great caution. Van Den Heever J took an extreme view on many restraint of trade issues [58], and she then came to the conclusion that restraints can be partially enforced. However, she did not discuss the circumstances under which this could take place. The judge merely compared the position of the court here with the position in maintenance cases. Yet the two are not comparable [59]. Partial enforcement can never be allowed on the same wide grounds.

On the other hand the court in *Coin* [60] followed a too narrow approach. The court held that an illegal clause could only be enforced if it did not have to write a new contract for the parties and if the unenforceable part could be severed from the enforceable part without changing the intention of the parties. The judgment in *Coin* can be faulted on many grounds.

Spoelstra J relied heavily on the submission in *Magna Alloys* that restraints of trade should be treated in accordance with the principles that apply with regard to all contracts contrary to public

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54. Magna Alloys 896; Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O) 686; Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 31; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 794; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 569; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 330-331; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488, 500, 503, 512; Van der Merwe 158; Kerr *Tribute* 189.

55. Magna Alloys 896; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 796.

56. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T), Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) infra; Cf Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 507 where the principle was not yet accepted but where the court contended that the existing law was unacceptable, See Nathan 42 and Otto 211-212; The cases that proceeded National Chemsearch but preceded Magna Alloys purported to follow it but they took a narrow view: Freight Bureau (Pty) Ltd v Kruger 1979 (4) SA 337 (W), Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 333, 334, Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) 862, Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner 1984 (3) SA 850 (W) 859, See *Annual Survey* (1984) 130-131, Schoombee 149.

57. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 312, 313, See the criticism Schoombee 148; Cf also the very wide approach of Stegmann J in Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 503, 512.

58. See supra Ch 2.3.2.

59. See the criticism Schoombee 133.

60. Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 569ff; See also a similarly narrow view Gero v Linder 1995 (2) SA 132 (O) 136 and the further explanation of the judge of his decision in Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O).

policy [61]. He then concluded that the same severability principles applying to other contracts contrary to public policy should also apply here [62]. The court showed that the classic severability principles were still accepted in another area of public policy in *Sasfin* [63]. However, the dictum from *Magna Alloys* is taken out of context, while the conclusion drawn from *Sasfin* cannot be supported.

- *Sasfin*, where quoted, concerned the question whether the contract could exist despite several clauses being illegal. Partial enforcement only comes into play where the question is whether a certain illegal clause can be limited or cut down [64]. This distinction may sometimes be difficult to draw, but it is a fundamental aspect of the current South African restraint of trade law.
- The statement taken from *Magna Alloys* was not made with severability in mind. The court in *Magna Alloys* did not contend that all contracts potentially against public policy should be dealt with along the same lines. If this had been the intention of Rabie CJ, then other esoteric elements of the restraint of trade doctrine suggested in the case would have had to be better explained.

The principle that these contracts should be judged in accordance with public policy does not mean that all diversity under the rubric of public policy will now be jettisoned [65]. Differences will be acceptable as long as they are based on broad public policy rules and principles, or on the distinctions between different sets of facts that may come before the court [66]. Here the peculiar position which the courts take on the legal status and the time at which reasonableness should be determined, and the extraordinary factual and public policy problems of restraints, may justify the novel partial enforcement approach.

The court in *Magna Alloys* stated that the question would be whether a part of (Afrikaans: gedeelte van) a clause can be enforced. Spoelstra J interpreted this as meaning that the question

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61. Magna Alloys 892; See also Schoombee 149 although he did not draw the same conclusion.
62. Cf New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 80 although it was concerned with the problem of the possible further requirement supra 4; Cf also Putsman v Taylor [1927] 1 KB 637 at 643 and 645 although the court here was however concerned with the very specific issue.
63. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 15 but see 31 actually accepted that wider partial enforcement would be possible in restraint of trade cases.
64. Christie 458-459, See also 464-465; Kerr 133-134 is confusing although the most acceptable reading seems to be that he thought that the severability in restraint of trade cases was made on similar grounds as in other cases but that it was changed by Magna Alloys; Lubbe and Murray 288 also asked whether this distinction should not be drawn; Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 31; Supra 1.
65. Christie 459ff.
66. See Baines Motors v Piek 1955 (1) SA 534 (A) 551 see the narrower approach 539, The distinction was probably intended to have wider implication than was thought by the court in National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1108, See Lubbe and Murray 288 they argue that the court in Baines believed restraints to be on a special plane but that does not seem acceptable, See also Christie 459, Ellison Kahn "Lex Commissoria, Penalties and the Doctrine of Severance" (1955) 72 *SALJ* 119.

would still be whether a physically separate part could be enforced. However, the court in *Magna Alloys* probably referred to an abstract part of a wider clause. The discussion in *Magna Alloys* of the theoretical framework for partial enforcement confirms that the court departed from the old severability approach. The decisions to which Rabie CJ referred all accepted a wider view. A more comprehensive discussion of this issue in *Magna Alloys* would have been more illuminating [67], but the view that was taken in *Magna Alloys* is clear enough to exclude the interpretation of Spoelstra J. The court in *Coin* finally had to accept that some of the dicta in *Magna Alloys* could be differently interpreted. Rabie CJ in *Magna Alloys* chose his words carefully. He preferred to talk of partial enforcement, and he probably meant something different by using this phrase.

Spoelstra J finally contended that almost all partial enforcement would be possible in terms of *National Chemsearch*. However, the court in *National Chemsearch* did not take a laissez-faire view of partial enforcement. The court set down strict rules. It created a mechanism that lies somewhere between narrow severability and a wide free-for-all. Spoelstra J in the end applied criteria that are mentioned in *Chemsearch* or come close to those mentioned by Botha J in *Chemsearch* [68].

The judges in some of the latest decisions also hark back to the traditional view of severability where the court has to abide by the intention of the parties [69]. The judicial reticence in *Coin* and other cases that proceeded it cannot be justified. The approach of the "new-reactionaries" must accordingly be rejected.

The basic principles that should now apply in this area were laid down in *National Chemsearch* [70]. The most important aspect will be that the court will view the entire process in terms of public policy [71]. The courts should be prepared to restrict a clause whether by adding, deleting, or changing words contained in the clause, although partial enforcement will only take place within narrow parameters. Botha J at times put it very widely: he stated that the courts will have a "general discretionary power" partially to enforce restraints [72]. But he later emphasised that

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67. See supra.
68. See infra.
69. Interest Computation Experts v Nel 1995 (1) SA 174 (T) 178-180; The Concept Factory v Heyl 1994 (2) SA 105 (T) 112, 114.
70. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1112ff with reference to Corbin vol 6A (1962) para 1390 66-74, Williston *Contracts* 3rd ed vol 14 para 1638 at 111-113, para 1647 at 293-297, Heydon 283-291; Schoombee 131, 148.
71. Van der Merwe 159; Some authorities have doubted whether public policy can play a role: Lubbe & Murray 287, De Bruin 1979 *De Rebus* 202-203. Other authorities have accepted that public policy should play some role see: Beuthin (1968) 85 *SALJ* 194 at 198, Hunt *Annual Survey of South African Law* (1962) 115 and the cases mentioned, But these authorities are discussing different problems that do not come into play here.
72. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1114.

restraints will only be partially enforced in appropriate cases and the following requirements were then laid down [73]:

- The party seeking partial enforcement must raise the issue and lay a basis for it. A court will not partially enforce a restraint if alternatives are not proposed by the enforcer [74]. But it was also accepted that there might be some exceptions [75]. It was suggested that this requirement will not apply if sufficient information as to reasonableness of a lesser clause is before the court, and if it does not prejudice the denier if the partial enforcement is allowed [76]. Few other exceptions will probably be made.
- Reformulation must not be drastic and the clause must not require major plastic surgery [77].
- Partial enforcement should save restraints that have been clumsily drawn too wide. Courts will not partially enforce a clause that is too wide because it is designed to operate in terrorem [78]: "The idea that a party may shoot for the moon, and that the court may freely alter the target to the highest tree does not find support in the authorities" (my translation) [79]. Hence, the courts will probably be keen to enforce a restraint if it is too wide because of unforeseen events that intervened since conclusion of the contract [80].
- The party to be restrained must not be unfairly or harshly affected by the restraint [81].

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73. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1116ff; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 331; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 796.

74. Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 488, But see Stegmann J especially 503 and 512; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 795-796; Cf Freight Bureau (Pty) Ltd v Kruger 1979 (4) SA 337 (W) 339; The Concept Factory v Heyl 1994 (2) SA 105 (T) 112, 114; See Schoombee 132.

75. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1114, See also 1116, The lenience of the court 1116 was probably because partial enforcement was only developed in this case; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 53; Schoombee 132.

76. Ibid; Cf BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 53.

77. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1116-1117; Freight Bureau (Pty) Ltd v Kruger 1979 (4) SA 337 (W) 339; This is probably also what the court had in mind in Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) 863; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 796; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 331, See however the narrow further elaboration of Hattingh J in Gero v Linder 1995 (2) SA 132 (O) 136 and the criticism supra; Van der Merwe 230.

78. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1117; Freight Bureau (Pty) Ltd v Kruger 1979 (4) SA 337 (W) 339; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 796, 797; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 331-332; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 571; Cf Ackermann-Goggingen AG v Marshing 1973 (4) SA 62 (C) 80; This requirement will address the problem mentioned in Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 507; See also in other jurisdictions Heydon *McGill* 357-358, Heydon 289-290; In terrorem terminology was first used Marsh 357, See Blake 682-683, Heydon 289-290.

79. Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 572.

80. See supra Ch 13.4.2.

81. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1117; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 796, 797 although it is questionable whether the arguments mentioned here should be relevant.

The South African approach will not necessarily be much wider than the orthodox doctrine, but it operates in a fundamentally different and more flexible manner. Christie puts it thus: [82] "conservatively applied, the new doctrine of restriction enables the courts to do plastic surgery as well as amputations, but does not permit them to produce Frankenstein monsters".

5.1. The partial enforcement approach: criticism and support

Some criticisms can be levelled against the new approach in South Africa. Problems exist both on a theoretical and practical level. However, most of these reservations are surmountable.

5.2. Pragmatic problems

Courts have been mindful of covenantees who deliberately frame their restraints in the widest possible terms in the knowledge that the court will narrow them down [83], and they have been careful in their attempts to protect covenantors against the risk of unnecessary litigation [84]. Heydon stated that it will be a drawback of a wider approach that much time will be taken up in re-drafting restraints [85].

However, these reservations about partial enforcement can be answered. The problems exposed are real, but the principles enumerated in *National Chemsearch* will ensure that these issues become specific requirements for partial enforcement. The in terrorem question will now play a direct role in the determination of partial enforcement where it has previously only manifested itself through the haze of technical rules. There is also a requirement that the court in South Africa will not allow major plastic surgery and this will, if conservatively applied, provide some protection. The complex and technical orthodox rules are so difficult to apply that they will also cause uncertainty and take up much court time [86], and the courts today will be better equipped to deal with this more flexibly. Heydon [87] acknowledged that English courts (and for that matter Scots courts) have now received considerable powers to re-frame contracts, and he suggested that the experience could help them in applying less orthodox principles of partial enforcement.

5.3. Theoretical problems

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82. Christie 440.
83. See Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 31.
84. Attwood v Lamont [1920] 3 KB 571 594; Mason 745 and 742, 734; Goldsoll v Goldman [1914] 2 Ch 603 at 613; PVB 310; Heydon 287-288; Blake 682-683; Walker 191; Kerr (1982) 188; Kerr *Tribute* 189-190; See the discussion of the in terrorem requirement supra 5.
85. Heydon 290.
86. Infra 5.4.
87. Heydon 291.

The orthodox severability doctrine is rooted in broad principles. The courts in all three systems have accepted that they cannot rewrite a contract for the parties [88]. The idea that contracts are voluntarily entered into and made by the parties has caused reluctance to alter the content and gist of a contract. Courts have accepted that severance could only be allowed if different parts were separated by the parties [89].

Yet the changes made in *Magna Alloys* will make a wider approach more palatable from a theoretical point of view [90]. It seems more acceptable to argue that a narrower restraint will be enforced as opposed to saying that the court will have to cut down a clause as agreed to by the parties. It will be of particular theoretical importance that the restraint of trade doctrine is an expression of public policy. Botha J in *National Chemsearch* stressed that "when the Court enforces a restraint partially, it is not making a new contract for the parties; it is simply tailoring its own order in accordance with the dictates of public policy [91]".

In law the lesser will often be regarded as being included in the greater [92]. It is difficult to see why a narrower restraint cannot be accepted, within the parameters expressed in *Chemsearch*, if the parties were prepared to agree to much wider terms [93]. The criticism of *Chemsearch* in *Allied* [94] is too formalistic [95]. The court equated the changing of the words of a restraint with the principle

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88. For examples see: Davies v Davies (1887) 36 ChD 359 at 387, 392-393; Baker v Hedgecock (1888) 39 ChD 520 at 522-523; Mills v Dunham [1891] 1 Ch 576 at 580; Mason 742; British Reinforced Concrete v Shelff [1921] 2 Ch 563 at 573; Vincents of Reading v Fogden (1932) 48 TLR 613 at 614; M & S Drapers v Reynolds [1956] 3 All ER 814 at 820; Chitty 16-166; Cheshire Fifoot and Furmston 422; Gurry 221; Heydon 285; British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68; Dumbarton Steamship Co Ltd v MacFarlane (1899) 1 F 993 at 997-998 and see the concession of counsel Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 72; Mulvein v Murray 1908 SC 528 at 533, 534; Scottish Farmer's Dairy Co (Glasgow) Ltd v McGhee 1933 SC 148 at 151-152; Cramond (Cash Register Terminals) Ltd v Reynolds 1988 GWD 8-310; Christie *Encyclopaedia* 601; Gloag 574; Scott Robinson 156; Walker 191; New United Yeast Distributors (Pty) Ltd v Brooks 1935 WLD 75 at 81-82; Pieterse v Cilliers 1945 (2) PH A.31 53 at 54; Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 329, 331; Christie 437; See Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 17, 18.

89. See supra 4.

90. See how these arguments were stressed in Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 313; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1114; Magna Alloys 896, See Schoombee 148; Christie 440.

91. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) especially 1115; Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) 312 must be approached with caution, See the criticism Schoombee 148, Kerr (1982) 187 it is not a logical necessity. Magna Alloys 896; Powertech Industries (Pty) Ltd v Jamneck 1993 (1) SA 328 (O) 331; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 569; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A) 794; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 500.

92. Prominent in the thought of Rabie CJ Magna Alloys 896 and Kerr *Tribute* 190; Cf British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68 expressly rejected this notion.

93. National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1114.

94. Allied Electric (Pty) Ltd v Meyer 1979 (4) SA 325 (W) 331. See the discussion of these criticisms Christie 439.

95. See the argument Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 507; Nathan 42.

that the courts cannot lay down obligations on the parties, but the aim of the requirements mentioned in *Chemsearch* is to ensure that the obligation is only cut down in the conceptual sense.

5.4. Advantages of the partial enforcement approach

There is much to commend the South African approach towards partial enforcement. In *SW Strange* in England [96] the court held that it was a defect that the courts in England had no power to re-frame the covenant. The South African courts will now be free from such constraints.

Heydon [97] mentioned that the orthodox severability doctrine will be harsh upon clumsy - rather than malicious - restraints drawn up by laymen. This is a very powerful argument against the traditional doctrine in cases where there are strong interests to be protected and the restriction has only overshot the mark because of lay ineptitude [98]. This will be a factor that the court will directly consider in determining whether partial enforcement can be made according to the *Chemsearch* approach. It is true that a party who consciously goes for too much should be "like the dog in the fable, they grasp at too much, and so lose all [99]". But this should be determined on the facts of every case.

The orthodox severability doctrine is overly formalistic and rigid. It developed in the context of promises on bonds where formalism is paramount [100]. The traditional approach towards severance will frequently be arbitrary [101]. It is often almost impossible to determine on the facts whether different aspects can be regarded as separate and whether the parties regarded them as separate. The partial enforcement doctrine asks the fundamental questions directly, and allows for matters of degree to be properly considered.

The current approach towards severability in England and Scotland only augments the most difficult problem in restraint of trade law. Long, incomprehensible and cumbersome clauses have become standard because covenantees have to provide for every conceivable possibility. Clauses are often divided into fragments to allow courts to sever illegal aspects on the basis of the standard principles of severability. However, they may be simplified if a more flexible approach is taken towards reasonableness. It is hoped that simplification of clauses in South Africa will now be

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96. SW Strange Ltd v Mann [1965] 1 WLR 629 at 642.
97. Heydon 284; Treitel 449.
98. Commercial Plastics Ltd v Vincent [1965] 1 QB 623 at 647.
99. Note (1888) 4 *LQR* 240 at 241; Heydon 287.
100. Heydon 284 with reference to Marsh 351ff.
101. Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 4 SA 494 (N) 507; National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1115, See the discussion of Heydon 284-285 of Corbin, Christie 439.

perceived as being essential because courts will be reluctant to enforce partial clauses that are profuse or concluded in terrorem.

Covenantors today often submit themselves to restraint of trade clauses which they do not intend to keep because they know such clauses to be too wide [102]. The courts in South Africa will be able to do everything in their power to enforce them partially if this is the position.

Heydon [103] argued that the law is internally inconsistent, because narrow severability notions are combined with often wide interpretation principles. This is not necessarily a criticism of the two devices, as they have different points of departure. But the courts will now at least be able to limit restraints without resorting to fanciful interpretation.

The *Chemsearch* approach is not theoretically pure [104]. It does not allow complete partial enforcement, but it liberates the doctrine from the shackles of traditional theory. It finely balances conflicting issues [105] and enables courts to stay close to the agreement without requiring them to be slaves to it.

6. Acknowledgement of severability clauses

Parties sometimes add a term to a restraint in which they acknowledge that some parts of the restraint agreement are intended to be severable from other parts [106]. The status of these clauses must be investigated.

6.1. Acknowledgement clauses and severability

The acknowledgement clause will sometimes merely restate the accepted principles of severability [107]. In such a case the clause will be of no real value. It would at most have an attitudinal impact where parties are in a position of equal bargaining. In *Sasfin* [108] Van Heerden JA stated that the onus will change if a contract contains such an acknowledgement clause. Yet it is difficult to see how this conclusion can be made, especially when the clause is as general and vague as it was

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102. Roffey v Catterall Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N) 507.
103. Heydon 290.
104. Schoombee 149.
105. On the conflicting issues see Heydon 290.
106. See cases where the issue was not discussed: National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T), David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W), Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C), Basson v Chilwan 1993 (3) SA 742 (A).
107. See e.g. the clause Humphrys v Laser Transport Holdings Ltd 1994 (4) SA 388 (C).
108. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 24.

there. Stripped of all its trappings, the argument would amount to this: the onus will shift when the parties admit that what is severable can be severed. It is a complete non sequitur.

The acknowledgement clause may show how the restraint clause should be judged in terms of existing principles [109]. The intention of the parties and the manner in which they express it will impact on the extent to which the court will be prepared to sever clauses. The parties play an active role in determining what is severable and an acknowledgement clause may be relevant. The courts may take note of an acknowledgement clause if it is aimed at showing that certain aspects of a clause are truly intended to be separate from others. For instance, the two aspects of a clause will not be sufficiently separate if the parties agree that the covenantor will not solicit or deal with certain customers. However, the courts will perhaps sever soliciting if a further clause is added by which the parties agree that the two aspects are severable. Interpretation will be important. Courts will have to look at the acknowledgement clause, and will then have to determine whether it applies in a particular situation, and whether it changes the severability position if it is read with other relevant clauses.

But parties will sometimes attempt to alter severability principles [110]. Some clauses will be intended to be of a wider impact. The courts have often tried to narrow down the import of such clauses. It has been accepted either that very wide clauses only confirm standard severability principles [111], or that they only make limited inroads into standard principles [112]. Yet none of the cases could have been so narrowed down, and this leads on to the next question: how will the courts deal with acknowledgements that are of wider import?

In *Sasfin* [113] Smalberger JA more correctly interpreted the acknowledgement clause widely. He [114] went on to say that such clauses would "offend the fundamental rule that the Court may not make a contract for the parties (Laws v Rutherford 1924 AD 261 at 264)". The court recognised that a clause of this nature could be used to abuse the judicial process if it is not properly limited. It was explained that parties could in such cases "simply insert whatever they wish, good or bad, into a

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109. See McBryde 606.

110. Cf Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1975] AC 571 at 580 the court suggested that estoppel cannot operate here because public policy comes into play.

111. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 16; Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71.

112. Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452, See Scott Robinson 156, Davies 500, Nelson 49; MacQueen 343.

113. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 16, Christie 462; Kerr 135; See Hall Advertising Ltd v Woodward 1992 GWD 29-1686 where the court apparently saw an acknowledgement clause as playing a wide role.

114. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 16; Van der Merwe 147; Nelson 49-50 although Sunshine Records is quoted out of context.

contract, and by resorting to a provision ... leave it to the court to separate the chaff from the wheat". He finally concluded: "not only could this lead to slovenliness in the drafting of agreements, but it could also provide fruitful ground for the exploitation of the unwary, the unenlightened and the disadvantaged. A clause having that effect might per se be contrary to public policy". Two possible grounds for not allowing these clauses can thus be discerned.

- They will be illegal and contrary to public policy in their own right.
- They may offend against the basic legal view of what an obligation ex contractu is. The parties must know what is expected of them in terms of the agreement [115].

In *Hinton & Higgs* [116] Lord Dervaird was prepared to give effect to an acknowledgement clause, although he placed some qualification on his acceptance. He thought that the parties could change the accepted rules by agreement as long as it allowed only wider *deletion*. But this decision is unacceptable. The clause in *Hinton & Higgs* [117], even if the interpretation of Lord Dervaird is accepted, clearly still attempted to oust the normal principles of severability. There are important policy values underlying the doctrine, and these were not properly evaluated by the court [118]. The notion that the courts should not physically rewrite a contract is only one, and probably not even the most important, aspect of the severability doctrine. The above mentioned objections to acknowledgement clauses will continue to apply even if the clause is so limited.

6.2. Acknowledgement clauses and partial enforcement

Acknowledgement clauses may be relevant in terms of the partial enforcement or *Chemsearch* test:

- It might assist the court in determining whether the restraint was bona fide too wide or whether it was in terrorem. Courts will probably be critical of a clause where parties are in a position of unequal bargaining and the acknowledgement clause is added to an extremely wide clause.
- It may assist the courts in determining whether partial enforcement will be reasonable towards the covenantor where the parties are equal. It will obviously play an important role in convincing the court that it would be fair to enforce the restraint partially if the covenantor has agreed that a particular more limited clause would be acceptable.

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115. See MacQueen 343; Davies 500; Nelson 50 it will cause uncertainty.
116. Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 at 452, 453.
117. Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450.
118. See supra 3.

- Acknowledgement clauses might influence the burden to place evidence before the court [119]. It will probably be taking such clauses too far to say that acknowledgement of severability clauses will lead to a change of onus, but such clauses, if properly framed, will at least force the party who does not bear the onus to disturb the balance of probability.

An acknowledgement clause will probably have no effect in so far as it attempts to exclude any of the requirements of the partial enforcement doctrine. Each of these requirements is based on objective and important public policy and equity considerations; they cannot be ousted by the agreement of the parties.

119. Cf Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 24 supra 6.1.

Chapter 15

Remedies in restraint of trade cases: interdict

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1. Remedies: interdict/injunction

Several remedies, such as declaratory orders [1] and claims for damages [2], can be utilised for breach of a restraint, but especially damages is regarded as inadequate [3]. Most restraints are enforced by interdict in Scotland [4] and South Africa [5] and injunction in England (hereafter, for the purpose of simplicity, collectively referred to as interdict) [6]. This discussion will therefore be geared towards looking at the role that interdicts will play in restraint of trade law.

1.1. Discretion for granting interdict

In English law the granting of specific performance is not the natural remedy, but in cases of injunction to enforce negative terms the court will take a more positive view. These injunctions will be granted even if it is not shown that damages will not be a proper alternative [7]. But a court will have a discretion to determine whether interdict should be granted [8], and this may alleviate some of the substantive problems of the doctrine in England [9]. In *Shell* [10] it was accepted that an interdict could not be granted for a party who was acting unfairly, on the basis of the English principle that a person who comes to equity must come to it with clean hands. The court accepted that it could refuse to grant interdict even if such an event could not be considered in terms of the doctrine, because it was ousted by the notion that reasonableness had to be determined from the moment of conclusion.

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1. See Eastham v Newcastle United Football Club Ltd [1964] 1 Ch 413 440ff; Smith & Wood 143 with reference to Marion White Ltd v Francis [1972] 3 All ER 857.
2. Trebilcock 77-79, 258; See recently Hall Advertising Ltd v Woodward 1992 GWD 29-1686; Specific performance can still be granted even if the contract provides for liquidated damages: National Provincial Bank v Marshall (1888) 40 ChD 112, Heydon 302, Curtis v Sandison (1831) 10 S 72 at 74, 75.
3. Davies Turner & Co v Lowen (1891) 64 LT 655 at 565; British Mannesmann Tube Co v Phillips (1903) 48 Sol Jo 117; Cf also Chitty 1214 and the possibility of the further possible remedy of recovery of profits; ; Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O) 689; Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 785; Contra Grigson v Kinsman 1921 NLR 172 at 177 cannot be accepted.
4. See also the problem with interdict where the document that contains the restraint is lost: Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38, McBryde 607; Walker 190; Scott Robinson 155.
5. See Kerr *Tribute* 198; Interdicts for the enforcement of restraints cannot be granted in Magistrates' Courts without an alternative claim for damages: Dendy 664, Badenhorst v Theophanous 1988 (1) SA 793 (C).
6. Heydon 301-302; Chitty 1202.
7. Chitty 27-041; Anson 520; Trebilcock 77-79 and see the economic analysis criticism 148-151, 258.
8. Davies Turner & Co v Lowen (1891) 64 LT 655; Atiyah 442; Chitty 27-040, 27-043; This question must not be confused with ineffectiveness and severability issues see Marsh 352.
9. See the approach British Reinforced Concrete Engineering Co Ltd v Shelff [1921] 2 Ch 563 at 580.
10. Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481 at 490, 492, See Atiyah 444.

In South Africa [11] and Scotland [12] specific performance of a contract is the natural remedy. Specific performance should be granted on interdict even where damages is a viable alternative (although this will seldom be the case [13]).

The question in South Africa is to determine how granting of final interdict in restraint of trade cases, which achieves specific performance, should relate to the specific performance principle. Interdicts have very specific requirements, and this may clash with strict principles of specific performance where an interdict has the effect of being final. Courts have generally accepted that the interdict requirements will apply even if the remedy is not an interdict but in name [14]. However, there are relatively few cases where these issues are discussed [15]. It must still be asked whether it is acceptable that these requirements should apply where a final remedy is craved.

Christie [16] vigorously argued that the principles of specific performance should prevail. Lubbe and Murray [17] mentioned that the authorities on which Christie relied barely supported him, but they accepted his line of argument and persuasively explained why final interdicts in restraint of trade and other contract cases should be treated according to the principles of specific performance. In *Kotze* the two different issues were merely combined [18].

However, courts still have a discretion to refrain from enforcing interdicts and this discretion will apply to interdicts in restraint of trade cases:

- Van Coller J in *Kemp* [19] refused to grant an interdict because the applicant had delayed his application and the respondent would have to stop working in a particular position, in which she had been employed for a considerable period.
- The court in *Capecan* held that a remedy may be refused if an attempt is made to achieve an unfair advantage [20].

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[11]. Cf the unrefined view that a public house restraint could be enforced Ohlsson's Cape Breweries Ltd v Cossey 1905 TH 16; Edgcombe v Hodgson (1902) 19 SC 224 at 225, Dempsey v Shambo 1936 EDL 330.
[12]. McBryde 511ff; See Curtis v Sandison (1831) 10 S 72 at 74, 74 and the granting of interdict.
[13]. Supra 1.
[14]. Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W); Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O); But see M Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 154ff and the criticisms, See Kerr 477.
[15]. Christie 629.
[16]. Christie 628 with reference Ohlsson's Cape Breweries Ltd v Cossey 1905 TH 16 20; See Kerr 646.
[17]. Lubbe & Murray 545.
[18]. Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 785.
[19]. Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O) 689-690.
[20]. Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 460-461; See the similar view in Edgcombe v Hodgson (1902) 19 SC 224 at 225.

- The court in *Commercial Holdings* [21] accepted that the discretion to grant interdict could be used to solve some of the problems of the pre-*Magna Alloys* approach towards the time at which reasonableness should be determined. This will still be true of the other legal systems under discussion, and the discretion can also be used to combat some of the problems of the post-*Magna Alloys* approach towards the time at which reasonableness should be determined.

But judges have remained reluctant to exercise this discretion in favour of the denier [22], and some authorities in South Africa have even questioned the existence of a discretion [23].

1.2. The enforcement of restraints and its extension to companies

In all three legal systems it will be a question whether a company can be restricted in terms of the restraint if a restricted covenantor is involved in the activities of a company [24]. The restriction will apply to a company that is expressly or impliedly included in a restraint [25], but a company can also be restricted in cases where this is not so.

In *Gilford* [26] it was accepted that an interdict could also be brought against a company utilised by the covenantor. Lord Harmsworth MR [27] on appeal decided that the company could also be restrained as "the purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which ... was a business in respect of which he had a fear that the plaintiffs might intervene and object". In *PSM* [28] it was accepted that this could be done even if the company was completely innocent in the matter.

In *J Louw* [29] Didcott J distinguished *Gilford* on the facts, but he also doubted the orthodox approach as expressed in that case [30]. He applied lifting of the veil principles. He finally maintained that it would create problems if the company in this case was restricted, because it would be

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21. Commercial & Industrial Holdings (Pvt) Ltd v Leigh-Smith 1982 (4) SA 226 (ZS) 234.
22. Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen 1988 (2) SA 454 (C) 460-461; Cf African Theatres Ltd v Jewell (1918) 39 NLR 1 where the court apparently accepted that it had a discretion although it took a narrow view of it.
23. See the authorities mentioned Kemp Sacs & Nell Real Estate (Edms) Bpk v Soll 1986 (1) SA 673 (O) 689-690.
24. Cf also Bristol Clothing and Supply Co (Glasgow) Ltd v Dickie (1933) 49 ShCt 70 refused to enforce the restraint against the wife of the covenantor.
25. Wholesale Provision Supplies CC v Exim International CC 1995 (1) SA 150 (T).
26. Gilford Motor Co Ltd v Horne [1933] Ch 935; Chitty 1210.
27. Ibid 956 and see also 961 and the discussion of Smith v Hancock [1894] 2 Ch 377 at 385, See Farwell J a quo 943-944, See also the similar point of Lawrence LJ 965, Romer LJ 969, See McBryde 606.
28. PSM International plc v Whitehouse [1992] IRLR 279 at 283.
29. J Louw and Co (Pty) Ltd v Richter 1987 (2) SA 237 (N) 241.
30. See supra.

difficult to lay down an interdict that would only apply when the company was used by the covenantor in a way that conflicted with the restraint. He stated in characteristically colourful fashion that:

> "no interdict against Lynkor [the company] should last longer than its dance to Richter's tune, one is left without a need to interdict it. All that is necessary is to stop the tune. The dance will then end. No occasion for stopping the tune, on the other hand, means none in any event to halt the dance [31]".

But the court in *Genwest* [32] again took a more orthodox view of such an interdict. It did not expressly decide the case in terms of lifting the veil principles. It merely accepted that companies could also be restricted if competition, in breach of the restraints, took place through the company. The court decided that there were intentional assistances of breaches in casu and that the company could accordingly be interdicted. The judge answered the reservation of Didcott J in *J Louw* by stating that application could be brought for lifting of the interdict if the company was not in the hands of the covenantors any more. It seems to be the most acceptable solution to the problem.

1.3. Relation between the content of a restraint and the scope of an interdict

A restraint does not have to follow the ipsissima verba of the covenant, and a narrower restraint can be granted if a wider restraint will also be effective [33]. There is no reason for drawing a distinction between verbal and substantive changes [34] as long as the courts remain within the parameters of the effective restraint of trade clause [35]. However, part of an illegal restraint can

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[31]. J Louw and Co (Pty) Ltd v Richter 1987 (2) SA 237 (N) 242.

[32]. Genwest Batteries (Pty) Ltd v Van der Heyden 1991 (1) SA 727 (T).

[33]. Rogers v Maddocks [1892] 3 Ch 346 at 356; Dubowski & Sons v Goldstein [1896] 1 QB 478 at 482-483; William Robinson & Co Ltd v Heuer [1898] 2 Ch 451 at 459 where this was not clearly kept apart from severability; Apparently contrary dicta in Warner Bros Pictures Inc v Nelson [1937] 1 KB 209 can be explained. The doctrine was not in issue, See Gooderson 425; Provident Financial Group plc v Hayward [1989] ICR 160 at 167 seems to accept that an illegal restraint can be enforced in part, But there was also a valid implied term here see Taylor LJ 170 and JA Mont infra at 586-587, 591; See JA Mont (UK) Ltd v Mills [1993] FSR 577 at 588 ancillary relief cannot be used to achieve what cannot be done by primary injunction; Heydon 290; Dumbarton Steamship Co Ltd v MacFarlane (1899) 1 F 993 at 997-998; British Workmen's & General Assurance Co Ltd v Wilkinson 1900 SLT 67 at 68; Mulvein v Murray 1908 SC 528 at 532 especially 535; Cramond (Cash Register Terminals) Ltd v Reynolds 1988 GWD 8-310; See Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 70 at 71 counsel did not try to enforce the whole of the restraint but it felt obliged to try to justify the restraint as a whole; Walker 192; See the interdict in African Theatres Trust Ltd v Johnson 1921 CPD 25; Roberts Construction Co Ltd v Verhoef 1952 (2) SA 300 (W) 304; Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (4) SA 436 (R) 442-443 is unacceptable; Limiting down a restraint can play an important role in bridging some of the problems which a court may have with granting relief see Chitty 27-044.

[34]. See supra and especially Gooderson 425.

[35]. See Lewis v Miller 1994 GWD 23-1388, The reclaiming motion Stirling Park & Co v Miller (Unrep), NCH (UK) Ltd v Mair 1994 GWD 34-1986.

only be enforced if the part that is the subject of the restraint is severable in England [36] and Scotland or partially enforceable in South Africa. If not, that part will be tainted by the ineffectiveness and no interdict can be based on it.

Lord Cowie in *A & D Bedrooms* [37] accepted that the interdict here would be acceptable - even if a wider restriction would not have been - merely because wider protection is not relevant on the interdict asked for. That is unacceptable. The argument can only be partly justified on the basis that the court was dealing with interim interdict (although it did not expressly discuss enforcement in such terms) [38].

2. Urgent relief

The most difficult problems will arise, however, where the remedy considered is interim or urgent interdict. Restraints are often of short duration and procedural delays will then be fatal to the covenantee. Interim interdict in England and Scotland will be analysed. This remedy has been fundamental in these legal systems. Then some remarks will be made about the position in South Africa .

2.1. Interlocutory injunctions in England

The rules and principles on interlocutory injunction have undergone radical changes in English law [39]. In earlier English cases the rule was that a prima facie case had to be made out [40] before interlocutory relief could be granted. However, cases are today decided on the basis of the principles set out in the watershed case of *Ethicon* [41], although it is trite that these rules should not

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[36]. Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1371; Cf Trebilcock 145 cannot be accepted, See also 151.

[37]. A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299.

[38]. Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248 is also only explicable on this basis, Cf the more acceptable principle argument of counsel for the covenantor.

[39]. Cf the unrefined approach Palace Theatre (Ltd) v Clensy (1909) 26 TLR 28.

[40]. Ronbar Enterprises Ltd v Green [1954] 2 All ER 266 at 270; GW Plowman & Son Ltd v Ash [1964] 2 All ER 10 at 11; Regent Oil Co Ltd v Aldon Motors Ltd [1965] 1 WLR 956 at 961-963; Regent Oil Co Ltd v JT Leavesley (Lichfield) Ltd [1966] 1 WLR 1210 especially 1213, 1216; Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 341; Lyne-Pirkis v Jones [1969] 1 WLR 1293; Cleveland Petroleum Co Ltd v Dartstone Ltd [1969] 1 WLR 116; Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 WLR 814 at 817, 829ff; Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd [1974] 1 QB 142 at 150; Clifford Davis Management Ltd WEA Records Ltd [1975] 1 WLR 61 at 66; George Orridge Ltd v Lee Jan 20 1975 (Unrep); T Lucas & Co Ltd v Mitchell [1974] Ch 129.

[41]. American Cyanamid Co v Ethicon Ltd [1975] AC 396 at 407; See the critical acceptance of Fellowes & Son v Fisher [1976] 1 QB 122 at 138, 140-141 and especially Browne LJ 137-138, Pennycuick LJ at 140-141; Lawrence David Ltd v Ashton [1989] ICR 123 at 135-136, 131ff and the criticism of the views of Lord Denning in Fellowes and Office Overload (the same criticism would apply to Prontaprint plc v Landon Litho Ltd [1987] FSR 315

be too rigidly applied [42], and courts should not become too strict in separating the different aspects, as they are intertwined [43]. The enforcer will firstly have to show that there is a serious issue to be tried [44], and the case will thereafter depend on balance of convenience [45].

In cases of interlocutory injunction, it will be important to determine whether a claim for damages will make up for any loss that will be suffered if the party who was unsuccessful in the interlocutory injunction is successful at the trial [46]. The court will start by determining whether the plaintiff can be compensated with damages if interlocutory injunction is not granted but he succeeds at the trial [47]. The question will firstly be whether damages are calculable [48], and secondly whether the defendant will be able to pay damages [49]. The court will be more prepared to refuse an injunction if the covenantor agrees to give account of all profits made by activities in conflict with the restraint or if all such profits are paid into a suspense account [50]. If the plaintiff cannot be so compensated with damages, then the next question will be whether the defendant can be properly compensated if interlocutory injunction is granted and the defendant is successful at the trial [51]. It

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especially at 328); See also the explanation of the case in: Cutsforth v Mansfield Inns Ltd [1986] 1 WLR 558 at 567, John Michael Design plc v Cooke [1987] 2 All ER 332 at 335, Dairy Crest Ltd v Pigott [1989] ICR 92 at 96-97, Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 411ff; See also on the question whether there is a serious issue to be tried Apple Corps Ltd v Apple Computer Inc [1992] RPC 70 79; Cf however Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] IRLR 483 at 488 the court merely stated that the restraint was valid and that it was accordingly unnecessary to express a view on balance of convenience; See Prescott 168.

42. Fellowes & Son v Fisher [1976] 1 QB 122 at 139.

43. GFI Group Inc v Eaglestone [1994] FSR 535 at 541.

44. Fellowes & Son v Fisher [1976] 1 QB 122 at 139, 141; Edwards v Worboys [1984] 1 AC 724 at 726, 728 and see the interpretation of Oswald Hickson Collier & Co v Carter-Ruck [1984] 1 AC 720. But especially Lord Denning did not appear to follow Ethicon; Cutsforth v Mansfield Inns Ltd [1986] 1 WLR 558 at 567; John Michael Design plc v Cooke [1987] 2 All ER 332 at 335; Dairy Crest Ltd v Pigott [1989] ICR 92 at 96; Lawrence David Ltd v Ashton [1989] ICR 123 at 133; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 422; PSM International plc v Whitehouse [1992] IRLR 279 at 282, 283; Morris Angel & Son Ltd v Hollande [1993] ICR 71 at 79; GFI Group Inc v Eaglestone [1994] FSR 535 at 540.

45. Clifford Davis Ltd v WEA Records [1975] 1 WLR 61 at 65-66; Budget Rent A Car International Inc v Mamos Slough Ltd (1977) 121 Sol Jo 374; Dairy Crest Ltd v Pigott [1989] ICR 92 at 96; Edwards v Worboys [1984] 1 AC 724 at 728; Business Seating Ltd v Broad [1989] ICR 729 at 732; Cf Canada in Trebilcock 77.

46. Edwards v Worboys [1984] 1 AC 724 at 728, Lansing Linde Ltd v Kerr [1991] 1 All ER 418 422, 431.

47. Dairy Crest Ltd v Pigott [1989] ICR 92 at 96; Lawrence David Ltd v Ashton [1989] ICR 123 at 133-134; Cf also Fellowes & Son v Fisher [1976] 1 QB 122 at 139, 141 although it was not really argued.

48. Kerr v Morris [1987] Ch 90 at 111; GFI Group Inc v Eaglestone [1994] FSR 535 at 542; Cf Office Overload Ltd v Gunn [1977] FSR 39 at 42; John Michael Design plc v Cooke [1987] 2 All ER 332 at 334.

49. Business Seating Ltd v Broad [1989] ICR 729 at 732; Lawrence David Ltd v Ashton [1989] ICR 123 at 134; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 328; Cutsforth v Mansfield Inns Ltd [1986] 1 WLR 558 at 567; PSM International plc v Whitehouse [1992] IRLR 279 at 283.

50. Clifford Davis Ltd v WEA Records [1975] 1 WLR 61 at 66.

51. Dairy Crest Ltd v Pigott [1989] ICR 92 at 97; Lawrence David Ltd v Ashton [1989] ICR 123 at 134, Davies 504; Fellowes & Son v Fisher [1976] 1 QB 122 at 139, See 134 although the judge followed a different general approach; Business Seating Ltd v Broad [1989] ICR 729 at 733.

will be important to determine whether the enforcer will be able to pay damages [52]. However, the major problem here is whether such damage will be calculable [53].

It will be regarded as a council of prudence to maintain the status quo if other issues are equal [54]. One such argument can be discerned from *PSM*, although it was not particularly related to the status quo element of the *Cyanamid* test and although the contentions were not always confined to interlocutory injunction cases [55]. Counsel for the defendant argued that an injunction against an ex-employee to restrain him from fulfilling contracts with third parties could not be granted. The court rejected the full rigour of the argument, but it accepted that judges should be chary of granting equitable relief that will have this effect. The court in *PSM* did not in the end find these arguments conclusive. It seemed that the contracts with the third party was a breach of the duty of fidelity, as they were concluded during employment, and that it was open for the plaintiff to argue that the third party was on notice. This is entirely convincing. It should have some persuasive power if interlocutory injunction will have the effect of interfering with the existing position of third parties. But perhaps even less important arguments may also displace this status quo ground.

General aspects of convenience may be relevant in determining the balance of convenience:

- The court in *GFI* [56] shortened the period of restriction on the basis that it was not laid down with the possibility of damage in mind, while it was also emphasised that other employees with much shorter restrictions had also defected.
- The court in *Dairy Crest* [57] considered that the employer would probably not lose customers even if prohibited from dealing with those customers because of the strong hold that he had over them.
- In *Cutsforth* [58] the court considered that the defendants acted in a high-handed manner.
- In *Fellowes* [59] the court considered that the covenantor would probably have no job if the restraint was granted, and the judge emphasised that it was not shown that the covenantor

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[52]. Lawrence David Ltd v Ashton [1989] ICR 123 at 134; Morris Angel & Son Ltd v Hollande [1993] ICR 71 at 79, 80.

[53]. Budget Rent A Car International Inc v Mamos Slough Ltd (1977) 121 Sol Jo 374; Kerr v Morris [1987] Ch 90 at 112; Cutsforth v Mansfield Inns Ltd [1986] 1 WLR 558 at 567; See however Dairy Crest Ltd v Pigott [1989] ICR 92 at 97 where this issue was not sufficiently discussed; Lawrence David Ltd v Ashton [1989] ICR 123 at 134 where the court said long-term damage could often be avoided by providing for a speedy trial; Business Seating Ltd v Broad [1989] ICR 729 at 733; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 328; Davies 503.

[54]. See Fellowes & Son v Fisher [1976] 1 QB 122 at 141, 142; Budget Rent A Car International Inc v Mamos Slough Ltd (1977) 121 Sol Jo 374; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 328 where the status quo argument was considered but rejected on the basis of sanctity of contract.

[55]. PSM International plc v Whitehouse [1992] IRLR 279 at 283.

[56]. GFI Group Inc v Eaglestone [1994] FSR 535 at 543-544.

[57]. Dairy Crest Ltd v Pigott [1989] ICR 92 at 97.

[58]. Cutsforth v Mansfield Inns Ltd [1986] 1 WLR 558 at 567.

[59]. Fellowes & Son v Fisher [1976] 1 QB 122 at 139-140.

would get the job back if successful at the trial. It was also acknowledged that the covenantor had to work near his house because of his wife's health problems. On the other hand, it was accepted that it was not proven that the covenantee would suffer comparable damage if the interdict was not given [60].

- The issue will not influence the reasonableness of the restraint, but the question whether the restraint is "uncommercial" and brought merely "on principle" should be important here. In *PSM* [61] it was argued by the defendant that an injunction should not be granted where no further damage could be suffered. The court rejected this argument on two grounds. It contended "on the contrary, the availability of damages was historically regarded as a bar to the equitable remedies....". However this is unacceptable. The judge confused the two concepts of damage and damages. He furthermore stated that the issue of possibility of damage was not specifically mentioned by the court in *Ethicon*. But such an argument cannot be conclusive even if the word damages is replaced with damage. The court in *Ethicon* did not attempt to enumerate a complete list of factors that may influence a restraint [62]. The most important point in *PSM* was that there was still a possibility that damage would be suffered on the facts. The employee had stolen a client of the plaintiff and relationships between the employer and the client had soured, but there was still a chance that the customer would return if they could not deal with the employee. There might however be cases where this will be of importance.
- The argument of counsel in *JA Mont* [63] that an injunction, and interlocutory injunction, will not be granted where the breach has been completed was accepted. The court should, however, not take a wide view of the issue. Restraints will generally constitute continuing obligations and a breach will not be completed before the end of the restraint, although there might be some exceptions where this issue will become important.
- It will still be useful to allow undertakings to influence the injunction granted and this may still play an important role in balancing the interests of the parties [64].

Finally the relative strength of the cases of the parties might sometimes be considered [65]. The court in *Ethicon* was cautious of this [66]. However, courts in restraint cases will take a wider view of the merits once certain requirements are met.

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60. Fellowes & Son v Fisher [1976] 1 QB 122 at 142.
61. PSM International plc v Whitehouse [1992] IRLR 279 at 283.
62. Supra.
63. JA Mont (UK) Ltd v Mills [1993] FSR 577 at 589.
64. Routh v Jones [1947] 1 All ER 179 at 194; Kerr v Morris [1987] Ch 90 at 112. See the further undertakings rejected for being impracticable.
65. Fellowes & Son v Fisher [1976] 1 QB 122 at 134, 139-140, 142 although this issue was only considered by Browne LJ 140 on the basis that it was "not improper". Pennycuick J 143 and Browne LJ asked for direction from the House of Lords; Business Seating Ltd v Broad [1989] ICR 729 at 733; Prontaprint plc v Landon Litho Ltd

Many interlocutory injunctions for the purpose of enforcing restraints will be final [67]; in many restraint of trade cases there will be a strong probability that they will not go to trial, and there are many restraints where the entire restrictive period or a substantial part of it will have run before the case comes to trial [68]. Lord Denning argued that these cases were so unique that they still had to be treated in terms of the old approach according to which a prima facie case had to be made out [69]. Judges will not today go as far as Lord Denning, but this aspect will now be the most important factor in determining whether the merits could be investigated [70].

Courts must also look at the complexity of the merits. It may be relevant if the case wholly or substantially depends on interpretation by the court [71]. Courts will be more willing to look at merits if facts and law can be easily ascertained [72]. Uncontroverted facts may be investigated to see if they can tip the scales if the balance of uncompensatable advantages is more or less equal [73].

Most fundamental is that the courts must remain in control of the process:

- The judge must still control the case to ensure that it does not drag out, and the relative strength of the cases of the different parties must be evaluated with other balance of convenience factors [74].
- If it is possible for the case to go to a speedy trial so that issues can be properly resolved, then the court must still see to it that it is done [75], and they should not waste time in trying to decide issues if they can be more effectively resolved at the trial.

[1987] FSR 315 but see 328 and 329 it was accepted that it would not make a difference; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 422-425, 430-433, 434-435.

66. American Cyanamid Co v Ethicon Ltd [1975] AC 396 at 409, See Fellowes & Son v Fisher [1976] 1 QB 122 at 130, 138, 141.

67. See also Oswald Hickson Collier & Co v Carter-Ruck [1984] 1 AC 720 at 723 he also thought that this case would be final.

68. Fellowes & Son v Fisher [1976] 1 QB 122 at 129, 133-134; Office Overload Ltd v Gunn [1977] FSR 39 at 43, 44-45; Business Seating Ltd v Broad [1989] ICR 729 at 732; Not properly discounted in Budget Rent A Car International Inc v Mamos Slough Ltd (1977) 121 Sol Jo 374; Dairy Crest Ltd v Pigott [1989] ICR 92 at 97; Lawrence David Ltd v Ashton [1989] ICR 123 135; John Michael Design plc v Cooke [1987] 2 All ER 332 at 334-335; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 at 327 although the court did not seem to have properly appreciated it; Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 423-424, 430-433, 434-435; Davies 503; Cf Peter Prescott Notes (1975) 91 *LQR* 171 on investigation of merits.

69. Fellowes & Son v Fisher [1976] 1 QB 122 at 113ff; Office Overload Ltd v Gunn [1977] FSR 39 at 42, 43, 44-45; Prontaprint plc v Landon Litho Ltd [1987] FSR 315 especially 327.

70. Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 423-425, 430-433, 434-435; Chitty 27-041; Davies 505.

71. Fellowes & Son v Fisher [1976] 1 QB 122 at 141.

72. See Kerr v Morris [1987] Ch 90 at 103, 111ff; Business Seating Ltd v Broad [1989] ICR 729 at 733 although such cases will mostly not get this far because the court will find that there is no serious issue to be tried; Cf on the dangers of investigating merits Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 341.

73. See Fellowes & Son v Fisher [1976] 1 QB 122 discussing American Cyanamid 138.

74. Lansing Linde Ltd v Kerr [1991] 1 All ER 418 at 424-425, 435.

2.2. Interim interdict in Scotland

In Scotland almost every recent reported restraint of trade case has been decided in interim interdict procedure [76]. It can be said that a new test for determining whether restraints should be maintained has developed by merging elements of the doctrine with the principles of interim interdict.

The courts do not follow the *American Cyanamid* approach [77]. They first determine whether a prima facie case [78] has been made out and they thereafter look at the balance of convenience [79]. Yet the prima facie case issue is problematic. It is difficult to establish to what extent the merits should be looked at. The courts have taken widely divergent views.

In *Reed Stenhouse* [80] Burn-Murdoch [81] was quoted and it was stated that the question at this stage "is not so much the absolute relevancy of the case as the seeming cogency of the need for interim interdict". The court then took a very conservative view of prima facie cases and the approach is almost as narrow as the English law requirement that there must be a triable issue. Woolman [82] stated that the petitioner "merely has to aver that the covenant has been agreed to and that breach

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[75] Cf Technograph Printed Circuits Ltd v Chalwyn Ltd [1967] RPC 339 at 344; Fellowes & Son v Fisher [1976] 1 QB 122 at 129 although these cases normally did not go to trial; Cutsforth v Mansfield Inns Ltd [1986] 1 WLR 558 at 567; Court a quo in the John Michael case see John Michael Design plc v Cooke [1987] 2 All ER 332 at 334; Dairy Crest Ltd v Pigott [1989] ICR 92 at 98; Lawrence David Ltd v Ashton [1989] ICR 123 at 134, 135; See PSM International plc v Whitehouse [1992] IRLR 279 at 281; In Morris Angel & Son Ltd v Hollande [1993] ICR 71 at 79 it was argued on Appeal that interlocutory injunction could not be granted because the judge in the previous court did not properly consider this issue but the court did not accept it on the facts; Edwards v Worboys [1984] 1 AC 724 727; For some of the problems with the fact that cases do not come before the court quickly see Systems Reliability Holdings plc v Smith [1990] IRLR 377; Cf Palace Theatre (Ltd) v Clensy (1909) 26 TLR 28 held that the interdict here could be granted if the trial came immediately as that would reduce interference with the ability to earn a living; Davies 504-505, 506.

[76]. McBryde 591; Woolman 254.

[77]. See counsel in Malden Timber Ltd v Leitch 1992 SLT 757 at 759. The court did not however discuss the English approach in any detail.

[78]. CR Smith Glaziers (Dunfermline) Ltd v Greenan 1993 SLT 1221 at 1223 and the criticism of the use of the phrase "bona fide case".

[79]. Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 74, See the more careful approach towards the merits 76; Rentokil Ltd v Kramer 1986 SLT 114 at 116; Hinton & Higgs (UK) Ltd v Murphy 1989 SLT 450 although it was not given any weight; Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71; Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 24, 29; A & D Bedrooms Ltd v Michael 1984 SLT 297; Dallas McMillan & Sinclair v Simpson 1989 SLT 454; Malden Timber Ltd v McLeish 1992 SLT 727 at 732; Lewis v Miller 1994 GWD 23-1388; Stirling Park & Co v Miller (unrep); McBryde 607; Woolman 254 argued that the sole question will concern balance of convenience.

[80]. Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at 358; See also Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248; See the criticism of the approach to trade secrets supra.

[81]. Burn-Murdoch Interdict 128.

[82]. Woolman 256.

of it is likely to cause damage for the court to prefer his claim". But the better view is that a stronger case will have to be made out.

In most cases, the merits have been investigated to a considerable degree [83]. Lord Abernethy in the recent *Lux Traffic* case [84] again did not even look at balance of convenience issues and the request for specification in this case must be commended. The extent to which the merits should be investigated is a matter of policy and Scots policy apparently leans towards considerable investigation, although it must be continuously kept in mind that evidence has not been tested in interim interdict cases [85] and that speed is at a premium here.

In *Malden Timber* [86] it was held that it would be important to the determination of balance of convenience if interim interdict proceedings would finally decide the case. This factor has not thus far been properly considered by the Scottish courts. It should be fundamentally important to the manner in which the court manages the case. The granting of interim interdict is generally a temporary measure [87], but it must be acknowledged that it will, in reality, play a different role in restraint of trade cases [88]. Where restraints are final the courts should go to greater lengths to settle legal issues. It will be unsatisfactory if they are unnecessarily conservative towards the analysis of the legal merits in such cases. It should also lead the courts in Scotland towards greater resolution of factual problems in cases where an interim interdict will have the final say. The court can make use of judicial knowledge while they could perhaps allow evidence on limited disputes.

The balance of convenience will have to be determined if it has been proved that the pursuer has a prima facie case. Woolman [89] stated in 1985 that "The requirement of 'balance of convenience' is not the procedural hurdle it once was for the petitioner to overcome". However, a different picture emerges from the recent spate of restraint of trade cases.

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83. See also Group 4 Total Security Ltd v Ferrier 1985 SC 70; WAC Ltd v Whillock 1990 SLT 213 at 220; Davies 505.

84. Lux Traffic Controls Ltd v Healey 1994 SLT 1153 at 1159ff; See Snap-on-tools Ltd v McCluskey 1991 GWD 7-367; Dallas McMillan v Simpson 1989 SLT 454 at 457; Aramark plc v Sommerville 1995 GWD 8-408.

85. Woolman 254, 256.

86. Malden Timber Ltd v McLeish 1992 SLT 727 at 733; McBryde 607 also stressed that most restraints expire before the court can consider final interdict.

87. Woolman 254; Cf Anthony v Rennie 1981 SLT (Notes) 11 stated that it would cause problems if a partnership by the covenantor is allowed only to be dashed later. This will only be a problem where there is a possibility that the case will continue.

88. This aspect is emphasised by Woolman 256 although he did not say how these matters should be considered.

89. Woolman 256.

That the merits can be prima facie decided in favour of one party or the other will have an important impact on the balance of convenience [90]. But the court must not rehash issues that have been properly considered under the prima facie case rubric [91]. In *Dallas* [92] the judge noted that many arguments relevant in determining whether there is a prima facie case would also be relevant here and he accepted that the balance would favour the covenantor. He did not think it necessary to investigate balance of convenience separately, but some distinction will be required.

The courts in Scotland have sometimes applied a watered down merits test that weighs the broad principles underlying the doctrine in an unsatisfactory and cursory manner [93]. They have sometimes juxtaposed the different interests affected and have then simply chosen one:

- In *A & D Bedrooms* [94] the court attempted to determine what would cause the most inconvenience. The judge compared two aspects. The defender would lose her job and the pursuer would suffer untold damages if his secrets were disclosed. He then decided to protect the pursuer. No reason was given why this should be so. It seems that watered down merits had been conclusive despite the court carefully saying that it could not be.
- The court in *Reed Stenhouse* [95] generally compared the damage which the covenantee can suffer with the possible handicaps it will place on the employee in the exercise of his duties. This issue per se cannot carry very much weight. Fortunately other more apposite factors were also considered in the case [96].

The interests of the parties and the public must be weighed in determining whether a remedy should be granted. In *WAC* [97] it was suggested that interim interdict should be granted as no damage to the public interest arose from it. However, the court correctly rejected this argument. It will be enough for the covenantor to show that the public policy is affected via his interests.

In some of the cases the interests of the covenantee were not properly appreciated:

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[90]. Malden Timber Ltd v McLeish 1992 SLT 727 at 732, 734, 735; It played some role Steiner v Breslin 1979 SLT (Notes) 34 at 35; Scottish Agricultural Industries plc v Richard 1990 GWD 13-640 without really discussing the issue.

[91]. CR Smith Glaziers (Dunfermline) Ltd v Greenan 1993 SLT 1221 at 1223.

[92]. Dallas McMillan v Simpson 1989 SLT 454 at 457.

[93]. Woolman 256 and his discussion of Anthony v Rennie 1981 SLT (Notes) 11 can be criticised on the same grounds.

[94]. A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299.

[95]. Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at 358; The same can be said of Rentokil Ltd v Hampton 1982 SLT 422.

[96]. See infra.

[97]. WAC Ltd v Whillock 1990 SLT 213 at 218.

- In *Randev* [98] the restraint arose from the sale of a hotel business. The court decided that the balance of convenience favoured the covenantor as no new competition would arise. The covenantor acquired a business that was already competing. This may have a marginal impact in determining the balance of convenience but it cannot play the important role which the court ascribed to it. Direct competition by the covenantor may cause greater interference with goodwill in innumerable ways. The court did not discount the principle that goodwill could be protected here.
- Lord Ross in *Bluebell* [99] stated that the covenantee was a world-wide corporation and that the activities of the covenantor would not have a drastic effect on its business. He compared this with the observation that the covenantor would lose his employment if interim interdict was granted. However, it does not seem as if this vague and inconclusive comparison should have carried as much weight as was attached to it. A company should not be discriminated against merely because it was a large corporation whose interests as a whole would not be substantially affected because of its huge bulk. The Lord President came to an opposite conclusion when comparing the same factors [100].

But many of the comparisons of interests will remain important. A court can firstly look at the position of the parties when interdict is sought. Circumstances may in some cases show a clear and obvious de facto discrepancy between the interests which the parties have in the interdict. Granting of an interdict will, firstly, be determined by the fact that the benefit which the covenantee gains from the interdict is either disproportionally larger or smaller than that of the covenantor:

- In *Steiner* [101] the restraint would make great inroads into the covenantor's ability to work and it could not be shown that losses to the covenantee would actually be caused by the new employment of the covenantor.
- In *Chill Foods* [102] the petitioner was only a shareholder in an affected company and the influence of competition was unclear, but non-enforcement would have a clear and adverse effect on the business of the respondent.
- The Second Division in *Group 4* [103] recalled an interim interdict on the basis that it only had two more months to run and because the pursuer was responsible for the delays [104]. However, a

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98. Randev v Pattar 1985 SLT 270.
99. Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 24; McBryde 607.
100. Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 29.
101. Steiner v Breslin 1979 SLT (Notes) 34 at 35; Hargreaves Vending Ltd v Moffatt 1990 GWD 26-1437; Douglas Llambias Associates Ltd v Napier 1990 GWD 39-2243; Woolman 254.
102. Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 40 although this aspect was not particularly related to restraints.
103. Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 76; Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at 358; McBryde 607.
104. See also on the role which delays can play Scotcoast Ltd v Halliday 1995 GWD 7-355.

contrary view was taken in *Greenan* [105], where the court considered it as a factor that swayed the balance of convenience in favour of granting a restraint. It quoted from *McKeag* [106], where it was stated that the interdict, in appropriate cases, might be granted if the restraint has only a short time to run but where it was also acknowledged that this issue is a double edged sword. One factor should be looked at in determining the impact of remaining duration. A restraint may cause the termination of employment for the covenantor and may make it difficult for him to find a similar position. The court should be reluctant to grant an interdict where it will have this effect and where the restraint only has a short time to run. It was not properly considered in *Greenan* but the judge explicitly accepted that the covenantor in casu would be able to continue in similar employment after the restraint had run out [107].

- In *WAC* [108] a competing business would still be carried on by people who had previously been connected to the pursuer and who were not subject to restraints even if the defender had been restricted. There would be no utility in enforcing a restriction on the covenantor.

On the other hand the court will seriously consider factors showing that the blow of the restraint to the covenantor will be softened in the particular case [109]:

- In *Bluebell* [110] the covenantee was still prepared to pay the covenantor his salary and to assist the covenantor in finding employment in the garment industry in a field that would not interfere with its interests. The court may sometimes utilise pro-active solutions to achieve the required balance. Woolman [111] submitted that interim interdict should, in suitable circumstances, be granted subject to conditions. The court may, for example, grant an interdict subject to the condition that the ex-employer will continue to pay the employee his salary. But the court must not consider it as an easy fix. The covenantee can in the right circumstances protect his interests without having to make such a payment, and payment for the duration of the restraint will not guarantee that the covenantor has an income after the restraint has terminated. The interdict might still deprive the covenantor of a particular opportunity for employment.

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105. CR Smith Glaziers (Dunfermline) Ltd v Greenan 1993 SLT 1221 at 1224.
106. CR Smith Glaziers (Dunfermline) Ltd v McKeag 1987 GWD 1-2.
107. But see the criticism infra.
108. WAC Ltd v Whillock 1990 SLT 213 at 218; See MacQueen 345.
109. See also: CR Smith Glaziers (Dunfermline) Ltd v McKeag 1987 GWD 1-2 where this was too easily accepted; Geo A Moore & Co Ltd v Menzies 1989 GWD 21-868.
110. Bluebell Apparel Ltd v Dickinson 1978 SC 16 at 24; Agma Chemical Co Ltd v Hart 1984 SLT 246 at 247 the First Division looked at this as a reasonableness aspect.
111. Woolman 256, 258.

- In *Anthony* [112] the covenantor was a medical practitioner whose husband was employed, and there was no suggestion of impoverishment. But this issue must be approached with even greater caution. The court will certainly be reluctant to enforce a restraint if it will impoverish the covenantor, but the opposite should not necessarily be true; freedom of work may still be radically interfered with even if there is no impoverishment. It could perhaps carry some weight that a person can rely on another for her livelihood but, it should be no more than a peripheral factor.
- It will be of importance if the restraint is in other respects limited and will only have a limited impact on the interests of the covenantor [113]. Non-disclosure restraints will only inhibit the business activities of the covenantor to a very limited extent [114]. In *Group 4* [115] Lord Ross maintained that the interdict would not prevent the employee from working for the competitors of the employer. He was appointed by his new employers as regional director for Scotland and he would only be excluded from dealing within 50 miles of Aberdeen. He could still carry out his duties in the rest of Scotland.
- In *Harben Pumps* [116] interim interdict was granted in terms of the implied duty not to use or disclose trade secrets. The court restricted an ex-employee from using certain information contained in documents. The ex-employee denied taking such documents. Yet, the court accepted that the ex-employee would not suffer because he would not have the information anyway if the documents were not taken. The court did not finally decide whether the information contained in documents constituted trade secrets, but it was accepted that the ex-employee would suffer no damage if the information was not secret, while unquantifiable and irretrievable damage would be suffered by the ex-employer if it was. But it is not necessarily so that information which is not a trade secret will not have value and that non-use will not lead to damage for the ex-employee. Information will still be very valuable where that information has become part of the personal skill and knowledge of the ex-employee. The most fundamental element here was probably that the information protected was contained in a document. The ex-employee could still use information acquired from other sources.

Particularly grave interests of the covenantor may also play an important role in determining the balance of convenience. In *Malden* [117] the court stated that the balance of convenience favoured

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112. Anthony v Rennie 1981 SLT (Notes) 11 at 12; Cameron v Mathieson 1994 GWD 29-1740.
113. Rentokil Ltd v Kramer 1986 SLT 114 at 116-117; Cameron v Mathieson 1994 GWD 29-1740; Hutchison & Craft v Burns 1994 GWD 26-1547.
114. Malden Timber Ltd v McLeish 1992 SLT 727 at 735-736.
115. Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 74.
116. Harben Pumps (Scotland) Ltd v Lafferty 1989 SLT 752 at 754.
117. Malden Timber Ltd v McLeish 1992 SLT 727 at 733.

the covenantor as he had made investment in his new business, which provided him with his income [118]. In *Scotcoast* [119] the covenantor would probably have to cease trading completely if he complied with the restraint on him. It makes sense that these type arguments should be relevant. However, these submissions must also be placed in perspective. In *WAC* [120] the defender made considerable investment in a new business and was providing employment for several people. But the judge showed little sympathy for him. It rejected the argument on the basis that the covenantor was aware of the terms of the restriction throughout.

Woolman [121] stated that the courts may here preserve the status quo, and *Chill Foods* placed some weight on the principle that the long established business should in general be protected against the interloper [122]. However, this issue should be no more than a peripheral factor. There is perhaps only one possible circumstance where this can be truly important and that is where a particular position has been brought about because of representations by any of the parties. In *WAC* [123] it was argued that interim interdict should not be granted because the pursuer had given the impression that disputes would be settled amicably. The court found that such an impression was not here created, but facts like this, if accepted, may play a considerable role in determining the balance of convenience.

The court must consider different possible remedies that may be granted in terms of the restraint. It must attempt to protect the interests of the covenantee while interfering as little as possible with the interests of the covenantor. Judges will have to look at other possible interdicts when determining balance of convenience [124]. The court will be reluctant to grant interdict on a wider restraint if proper protection can be gained by granting a narrower one. Where a non-solicitation restraint will allow proper protection the court will be reluctant to allow wider restraint [125]. However, courts should remain cautious. In *Living Design* [126] it was contended that an interim interdict should not be granted in wider terms as a non-use and non-disclosure restraint could also

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118. See also Malden Timber Ltd v McLeish 1992 SLT 727 at 734.
119. Scotcoast Ltd v Halliday 1995 GWD 7-355.
120. WAC Ltd v Whillock 1990 SLT 213 at 218.
121. Woolman 254.
122. Chill Foods (Scotland) Ltd v Cool Foods Ltd 1977 SLT 38 at 41; McBryde 607; Cf Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F 1105 1117 where the question was whether interim execution should be allowed pending an appeal to the House of Lords. The court rejected the argument.
123. WAC Ltd v Whillock 1990 SLT 213 at 217-218; Cf CR Smith Glaziers (Dunfermline) Ltd v Greenan 1993 SLT 1221 at 1224.
124. Malden Timber Ltd v McLeish 1992 SLT 727 at 732.
125. Rentokil Ltd v Hampton 1982 SLT 422 at 423; Steiner v Breslin 1979 SLT (Notes) 34 at 35 where the argument played some role.
126. Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71; Woolman 258.

be granted. But the courts have always accepted that these restrictions are insufficient [127]. A contrary and more acceptable view was taken by the Second Division in *Greenan* [128].

The issues of damages will also play an important role in Scotland [129], although the different aspects are not as systematically balanced as in English law [130], and although bold statements are sometimes made without proper investigation of all the issues [131]. Courts may in some cases remit the petitioner or pursuer to his claim in damages [132], while they will in other cases allow interim interdict on the basis that the denier will have to seek his remedy in damages [133]. But this solution will again not be applied where it will be difficult to prove or claim damages [134]. This will often be so, and the damages issue will not be the panacea for the problems of interim interdict [135]. The question whether the ex-employee would be able to find employment after the restraint had run out will be important and this will have to be properly investigated [136]. It cannot merely be assumed. In *Malden* [137] it was important that the covenantor would keep a record of customers so that damages would be determinable. Moreover, the courts will not decide a case on this basis if it is possible that any of the parties will not be able to pay damages. But these problems have been solved in several ways:

- The pursuer [138] or the defender [139] may be asked to lodge caution from which damages can be drawn.
- In *Malden* [140] the court stated that inability to pay would at least suggest inability to compete, but that will be little consolation to a covenantee who has not only lost his customers but who has lost them to a less successful competitor. It is hoped that this argument will not carry too much weight with future Scottish courts.

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127. See supra Ch 8.5.3 and especially the Scottish decisions: Bluebell Apparel Ltd v Dickinson 1978 SC 16, Forte 21 called the interdict here "limping", SOS Bureau Ltd v Payne 1982 SLT ShCt 33 at 36.
128. CR Smith Glaziers (Dunfermline) Ltd v Greenan 1993 SLT 1221 at 1223.
129. Woolman 258.
130. A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299; Living Design (Home Improvement) Ltd v Davidson [1994] IRLR 69 at 71.
131. Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at 358; Group 4 Total Security Ltd v Ferrier 1985 SC 70 at 76.
132. Hargreaves Vending Ltd v Moffatt 1990 GWD 26-1437 although it was not really investigated; Woolman 256.
133. Scottish Agricultural Industries plc v Richard 1990 GWD 13-640 without really discussing the issue.
134. Rentokil Ltd v Kramer 1986 SLT 114 at 116-117; Hutchison & Craft v Burns 1994 GWD 26-1547; McBryde 607.
135. Woolman 256 does not take proper notice of this.
136. CR Smith Glaziers (Dunfermline) Ltd v Greenan 1993 SLT 1221 at 1223, 1224.
137. Malden Timber Ltd v McLeish 1992 SLT 727 at 734.
138. Macintyre v MacRaild (1866) 4 M 571; W Williams & Son v Fairbairn (1899) 1 F 944; Woolman 256.
139. Woolman 258.
140. Malden Timber Ltd v McLeish 1992 SLT 727 at 734.

The court will sometimes refrain from granting an interdict if suitable undertakings are made by the denier [141]. However, it must again be ensured that the interest of the petitioner is not undermined by this. An undertaking will not be conclusive where the pursuer will have no faith in the undertaking [142] or where it will narrow down a wider restriction to which the covenantee will probably be entitled [143].

2.2.1. Rephrasing interdicts in England and Scotland

It might become important for courts in England and Scotland to phrase interdicts in such a manner that they ensure protection of interests of the enforcer while limiting interference with the interests of the denier. Courts have followed a narrow approach to severability, but they should perhaps have a wider power to phrase temporary interdicts [144]. This seems to have been impliedly accepted by the Scots courts in *A & D Bedrooms* and *Agma Chemical* [145]. These cases can only really be sufficiently explained on this basis.

In *GFI* [146] the court simply limited the duration of the restraint from 20 weeks to 13 weeks. The case might, however, be explained on different grounds. It concerned a restraint that operated during the notice period at the end of an employment contract. The effectiveness of the contract was apparently not in any real doubt.

The court in *Edwards* [147] tried to strike a balance by providing that the injunction had to be prefaced by a consent clause (the restraint here provided for exceptions in the case of written consent). The court then retained a power to resolve disputes that may arise with regard to particular customers. This strategy will not be generally useful, but it may also be pragmatically applied in other situations. The general principle that it lays down should allow for other pragmatic interlocutory injunctions.

But a narrow view was taken in *John Michael* [148], where interlocutory injunction was asked against the covenantor, who was prohibited from dealing with customers of the covenantee. The court a quo granted an injunction but it excluded one of the previous clients of John Michael (JM),

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141. Scotcoast Ltd v Halliday 1995 GWD 7-355; Woolman 258.
142. WAC Ltd v Whillock 1990 SLT 213 at 219-220.
143. Anthony v Rennie 1981 SLT (Notes) 11 and 12.
144. Cf Palace Theatre (Ltd) v Clensy (1909) 26 TLR 28; Infra 1.3.
145. A & D Bedrooms Ltd v Michael 1984 SLT 297 at 299, Agma Chemical Co Ltd v Hart 1984 SLT 246 at 248.
146. GFI Group Inc v Eaglestone [1994] FSR 535 at 543-544.
147. Edwards v Worboys [1984] 1 AC 724 at 727, 728.
148. John Michael Design plc v Cooke [1987] 2 All ER 332 at 334, 335.

who was now dealing with the covenantor and who, it was common cause, would not return to (JM) if it was not allowed to deal with the covenantor. This appears to be a fair and pragmatic solution but the Court of Appeal rejected it [149]. Two tenuous arguments were put forward:

- The sanctity of contract and the dislike of the courts for a deliberate breach of contract was mentioned although O'Connor LJ accepted that it was not of the greatest importance here [150].
- It was an accepted principle that not only could customers who were faithful be protected, but customers on whom the employer has a tenuous hold could also fall within a restraint. The court emphasised that it has thus far been regarded as irrelevant for the purpose of reasonableness that restricted customers left the employer and had no intention to return [151].

These contentions are all important reasonableness arguments, but their significance is reduced where balance of convenience for the granting of temporary interdict is considered. Here it has not been finally settled that the restraint is acceptable.

In *John Michael* [152] the court acknowledged that the merits had to be investigated. The view was then taken that a final decision on the merits would exclude the possibility of pragmatic solutions like the one proposed in the court a quo, although it was admitted that solutions of this nature might be effective in other types of cases. But an investigation of the merits did not finally deal with all the important issues. Decisions on the merits might reduce the need for pragmatic remedies but will often not eliminate it completely.

Courts should not shy away from pragmatic solutions despite *John Michael*. Only one real problem is mentioned by O'Connor LJ [153]. The courts must be careful not to cause even greater uncertainty when excluding certain contracts from an injunction. It might cause problems where certain contracts are excluded from an interlocutory injunction if the case will probably go on to trial and if it is possible that the contracts excluded may be interrupted, before conclusion, by the orders made at the trial [154].

2.3. Interim interdict in South Africa

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149. John Michael Design plc v Cooke [1987] 2 All ER 332 at 334, 335, Cf also PSM International plc v Whitehouse [1992] IRLR 279 at 283, Cf also the criticism Atiyah 343.
150. John Michael Design plc v Cooke [1987] 2 All ER 332 at 334.
151. John Michael Design plc v Cooke [1987] 2 All ER 332 at 334 and 335 and see supra Ch 6.4.3.
152. See the discussion supra Ch 6.4.3.
153. John Michael Design plc v Cooke [1987] 2 All ER 332 at 335.
154. Supra.

Interim interdict does not play as important a role as it does in the other systems. In South Africa urgent interdict will often be used to enforce restraints. However, restraints will also sometimes be enforced by interim interdict, and the two orthodox requirements will again apply. An interdict will only be granted if there is a prima facie [155] case and the balance of convenience favours it [156].

Interim interdicts on the basis of restraints will often be final [157], and this will have to be taken into account [158]. Marais J in *BHT* [159] took the issue one step further. He decided that substance is cardinal here, and not form. Interim interdict will be judged like final relief if the interim interdict will *actually* be final.

The court in *BHT* [160] decided that relief will only be granted if it is sufficiently shown that such relief can be given on the affidavits of both parties regardless of the onus. Marais J stressed that this should be so because the applicant is the one who was prepared to come to court. However, it must be asked whether this argument should be conclusive in other cases. The enforcer is often forced to choose this process because it will be the only way in which he can be protected. The court should not lay too much at the door of the enforcer. It should go as far as possible to ensure that such cases are satisfactorily resolved. Courts should be more lenient towards allowing evidence to resolve disputes [161]. It might often be simpler to allow viva voce evidence here because these cases normally do not turn on intricate factual disputes.

2.4. Onus in urgent interdict cases in South Africa

The change of onus effected by *Magna Alloys* will improve the position of the enforcer [162]. But cases will mostly proceed on application and facts will be deduced from sworn affidavits. The enforcer will thus be disadvantaged because factual disputes will be decided on the facts averred by the applicant and admitted by the respondent as well as the further facts alleged by the

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155. SA Breweries Ltd v Muriel (1905) 26 NLR 362 at 372; Elcock and Co v Elcock 1928 WLD 121 at 124; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 436.
156. U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 150-151; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 438; Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 512.
157. Schoombee 150.
158. U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 137 (D) 150-151; David Wuhl (Pty) Ltd v Badler 1984 (3) SA 427 (W) 438.
159. BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 54-56; Cf Kotze & Genis (Edms) Bpk v Potgieter 1995 (3) SA 783 (C) 785 where the court accepted the argument although it was acknowledged that it did not make a difference in the particular case.
160. BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 55.
161. Cf however Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 510.
162. Schoombee 150.

respondent [163]. This will be the case even though the respondent will now normally bear the onus in restraint of trade cases [164]. The court will have to distinguish two issues:

- All the necessary facts may not be before the court because the contract denier, who bears the onus, has failed to lay the necessary facts before it.
- It may be impossible to establish what the necessary facts are because they cannot be established in the particular process i.e. in a case of interim interdict because of a dispute.

In the former type of case the court should decide for the enforcer in the latter interdict should not be allowed [165]. Yet it must be acknowledged that interdict is often the only remedy that will provide adequate relief [166].

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163. Cansa (Pty) Ltd v Van Der Nest 1974 (2) SA 64 (C) 65-66; National Chemsearch SA (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) 1095; Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W) 359; Coin Sekerheidsgroep (Edms) Bpk v Kruger 1993 (3) SA 564 (T) 567; Basson v Chilwan 1993 (3) SA 742 (A) 753 common cause between counsel.

164. Rawlins v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) 541-542; See however Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T) 510 where the court merely accepted that the covenantor had not proved the necessary aspects of reasonableness and that he had accordingly not discharged the onus; Fisher v Salon La Mystique 1995 (2) SA 136 (O) 141.

165. This seems to underlie the decision on the facts in BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) 56 because the court still places considerable emphasis on the onus.

166. Supra 2.3.

Chapter 16

Conclusion

Some Broad conclusions

The restraint of trade doctrine exists at the point where black-letter law and broad notions of policy converge. There is a great need for precision and specificity in this area. Restraints of trade are commercially important; they are used as planning instruments by commercial men. Great uncertainty will ensue if contracting parties cannot, to some extent, predict what would be an acceptable restraint. Yet the doctrine balances the fundamental principles of freedom of work and sanctity of contract. It will often be difficult to achieve this within the straitjacket of certainty.

The solutions developed in England around the turn of the century finely balance these issues, and English law on this point has been substantially received in the mixed legal systems of Scotland and South Africa. The different legal systems are not in all respects similar. But differences are subtle. In South Africa some judges revolted against the English approach, but this only culminated in changes to the manner in which restraints are dealt with in the courts. Suggestions of change were sometimes proposed on rigid dogmatic grounds, but the changes that finally ensued are in many senses pragmatic, fair, and in accordance with the spirit of the doctrine. In Scotland reported cases on restraint came slowly. English cases were often referred to, although they were sometimes slightly differently understood. But a spate of recent reported cases has had its impact in Scots law. Scots judges now more often refer to Scots authorities. Yet, the rules and principles in these cases are not that much different from those applying in England. In Scotland the biggest point of distinction has developed from procedural differences with English law. The Scots doctrine in interim interdict proceedings, where most restraint cases are decided, is sometimes quite far removed from the restraint of trade principles that courts purport to apply. Some of the decisions appear slipshod but inventive solutions have sometimes been proposed. It is manifest that the Scots judges have not regarded themselves as being as closely tied up by restraint of trade dogma as their English counterparts.

The reasonableness test has remained the pivot around which the doctrine revolves. It will have to be established whether a clause is reasonable inter partes once it has been ascertained that it is in restraint of trade. Once a clause is in restraint of trade, it is unquestionable that the principle of freedom of work will be interfered with. Thus the most fundamental question will then be: can the restraint be justified? And this question has been answered by investigating the interests that the

the onus to prove effectivity will be on the person who wants to rely on it, and the onus to prove that the restraint is against public interest will be on the person who relies on that fact once reasonableness has been established. The distinction between the different legal systems is principally based on the essential preference for sanctity of contract over freedom of work in South Africa, although other factors also come into it. Whether the other legal systems should follow South Africa is a question of policy.

In South Africa it has now been confirmed that illegal restraints are merely unenforceable. But it is difficult to determine exactly what the status of an unacceptable restraint in England and Scotland is. Most modern authorities seem to use the word unenforceable, but the full theoretical consequences of this have not received the attention of courts. It is suggested that the South African solution would probably be the most acceptable. A restraint relationship should be recognised by law in so far as it has been acted upon. Its effect on other obligations that cannot be severed probably will be that they will also become relatively unenforceable, although they might be enforced once the restraint has been performed.

The great strength of the reforms effected by the South African Appeal Court in *Magna Alloys* is the new approach to the time at which reasonableness should be determined, and the acceptance of the notion that restraints can be partially enforced. The orthodox view is that reasonableness should be determined from the time at which the contract is concluded. But this has been rejected in South Africa. Reasonableness will there be determined from the time at which the court is asked to enforce the restraint. Important principles underlie the English and Scots stance, and these principles have not been properly considered in *Magna Alloys*, but it is submitted that the South African approach is preferable as long as it is pragmatically applied. Important public policy issues come into play in the area of restraint of trade, and it is necessary that these principles should be promoted with reference to up-to-date facts. Fairness towards the parties and respect for their planning devices can be achieved without accepting the entrenched Anglo-Scottish dogma.

In determining whether unacceptable parts of restraint clauses can be taken out, the South African courts have apparently moved away from the pedantic severability doctrine. The partial enforcement approach was confirmed in *Magna Alloys* in South Africa. Recent South African decisions have found it difficult to break with old dogma, but it is suggested that the realistic approach in *National Chemsearch* should be followed in all three systems. It finely balances the conflicting notions that come into play here. The severability doctrine can rightly be described as an occult practice, and it is understandable that courts have preferred to narrow down restraints by means of contextual interpretation.

Finally, restraints produce very complex problems when it comes to judicial remedies. They are often of short duration and quick remedies will be required. The most important question that courts should ask in interim proceedings is whether there is any likelihood that the cases will go on to trial. Creative solutions will have to be sought if this is not the case. The merits will have to be investigated in so far as that is realistically possible. Legal issues will have to be resolved, and it might even be necessary to allow some evidence to be adduced. Some chopping and changing of restraints should be allowed.

Remedies can be creatively used to provide some flexibility in the area of restraint of trade. Flexible granting of remedies will probably ensure realism in England and Scotland, even if the courts insist on taking a narrow view of the time at which reasonableness should be determined. Some doubts have in South Africa existed on the question whether a remedy can here be refused on the grounds of fairness, but it is suggested that it can.

Only if the doctrine is understood in traditional cases can it be developed further in the newer types of restraint cases that have come before the courts. The broad and consistent principles that have been developed here can also form the basis of the further development of the doctrine into new areas. Wider interests may be protected, different methodologies may be used, but the new restraints will still exist in the shadow of the principles and rules that have been expounded in the traditional cases.